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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MELVIN POWERS, DON NORWOOD,
CANDACE WOODLEY and DEBRA BAILES,

Petitioners,

v.

THE CITY OF HUNTSVILLE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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MICHAEL J. PASSINO

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Alabama state courts are preempted by the National Labor Relations Act from adjudicating whether peaceful organizing activity constitutes criminal conduct.

2. Whether Section 13A-7-4, Code of Alabama, (Criminal Trespass) is overly broad and vague and violates the First and Fourteenth Amendments to the United States Constitution.

3. Whether convictions of criminal trespass violate the due process clause of the Fourteenth Amendment to the Constitution because there is no evidence to support the conclusion that Petitioners acted "knowingly" or that they were on the premises "unlawfully."

4. Whether the convictions violate the due process clause of the Fourteenth Amendment to the United States Constitution because the Alabama court implicitly found that Petitioners had the burden to show that they were on the premises lawfully.

5. Whether the prosecution of Petitioners under Section 13A-7-4, Code of Alabama, is selective prosecution in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

6. Whether Petitioners' conduct is protected under Section 7 of the National Labor Relations Act and therefore the requisite proof of guilty knowledge was lacking.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Supreme Court of Alabama are listed in the caption of this case.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MELVIN POWERS, DON NORWOOD,
CANDACE WOODLEY and DEBRA BAILES,

Petitioners,

v.

THE CITY OF HUNTSVILLE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

OPINIONS BELOW

The order of the Alabama Supreme Court denying Petitioners' Petition for Writ of Certiorari, without opinion is unpublished and appears in the Appendix (Appendix F, page 55a). The opinion of the Court of Criminal Appeals of Alabama affirming Petitioners' convictions is unpublished and appears in the Appendix (Appendix C, pages 43a-49a).

JURISDICTION

The judgment of the Supreme Court of Alabama denying Petitioners' Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals was entered November 23, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The first amendment to the U.S. Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble.

The fourteenth amendment to the U.S. Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 7 of the National Labor Relations Act, 29 U.S.C. §157 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 13A-7-4 of the Alabama Criminal Code provides:

> (a) A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises.

Section 13A-7-1(4) of the Alabama Criminal Code provides in pertinent part:

> A person "enters or remains unlawfully" in or upon premises when he is not licensed, invited or privileged to do so. A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such persons or other authorized person.

STATEMENT OF THE CASE

A. Brief Statement of Facts and the Proceedings Below

On November 24, 1981, Candace Woodley, Debra Bailes, Melvin Powers and Don Norwood entered Albertson's Food Market in Huntsville, Alabama. Powers and Norwood were union organizers. Woodley and Bailes were former employees of Albertson's who had been fired for their union activity. On November 24, both women wore union jackets in the store. The store manager recognized the women and saw an NLRB document on the table where the four petitioners sat peacefully drinking coffee. The store manager ordered the four to leave the premises. When they refused, he called the

police who arrested Powers. Twice later in the day,petitioners returned to Albertson's, a public establishment, where they made purchases and conducted themselves peacefully. On each occasion they were ordered to leave by the management and arrested by the Huntsville police when they refused to leave. On each occasion, petitioners identified themselves as union organizers and attempted to explain that they were engaged in protected organizing activity.

The charges against petitioners were initially tried in the Municipal Court of Huntsville, Alabama before the Honorable W.H. Griffin, Judge, wherein all four defendants were found guilty on all charges of criminal trespass in the third degree. A Twenty-five ($25.00) Dollar fine plus costs was imposed.

Defendants prayed an appeal to the Circuit Court for Madison County, Alabama, wherein defendant Powers was found guilty and was fined in one case, Twenty-five ($25.00) Dollars plus costs, Fifty ($50.00) Dollars plus costs in another and One Hundred ($100.00) Dollars plus costs in the third. Defendant Norwood was found guilty and fined Twenty-five ($25.00) Dollars plus costs in one case and Fifty ($50.00) Dollars plus costs in the other. Woodley was found guilty and fined Twenty-five ($25.00) plus costs. Bailes was found guilty and fined Twenty-five ($25.00) Dollars plus costs.

All four defendants prayed an appeal to the Court of Criminal Appeals of Alabama, which affirmed the convictions in an opinion rendered on August 2, 1983. A petition to rehear was denied on October 4, 1983. Their Petition for a Writ of Certiorari was denied by the Alabama Supreme Court, without opinion on November 23, 1983. Related cases are pending before the National

Labor Relations Board, *In the matter of Albertsons, Inc.-Southco Division*, No. 10-CA-17793, and before the United States District Court.

B. The Federal Questions Were Raised in the Proceedings Below

Petitioners' contentions that prosecution for criminal treapass is pre-empted by the National Labor Relations Act and in violation of their first amendment rights first were raised in a motion to dismiss made in the Municipal Court for the City of Huntsville (Appendix A, pp. 4a-11a). The motion was denied.

Petitioners' contentions that the Alabama trespass statute is overbroad and vague, that there was no proof of criminal intent, that criminal prosecution is pre-empted by federal legislation and that they were victims of selective prosecution in violation of the fourteenth amendment to the Constitution were raised by written motions made in the Circuit Court for Madison County, Alabama, all of which were denied (Appendix B, Clerk's Record pages 20a, 22a).

Petitioners' pre-emption and due process contentions, including the burden-shifting argument were presented to the Alabama Court of Criminal Appeals (App. pp. 51a-54a) and the Alabama Supreme Court (Appendix E, Petition for Writ of Certiorari pp. 1-12) and were rejected by both courts. Thus, all federal questions have been raised timely and properly below.

REASONS FOR GRANTING THE WRIT

A. ALABAMA STATE COURTS ARE PREEMPTED UNDER THE NATIONAL LABOR RELATIONS ACT FROM ADJUDICATING WHETHER OR NOT PEACEFUL ORGANIZING ACTIVITY CONSTITUTES CRIMINAL CONDUCT.

As the Alabama Court of Criminal Appeals noted at the outset of its opinion of August 2, 1983, "[i]t is manifestly apparent that all parties knew the people were present in the delicatessen section of the Albertson's store in connection with efforts to organize the employees." (Appendix C, pages 44a). This finding, coupled with the fact that it is clear that petitioners' organizing activities were absolutely peaceful, support the ineluctable conclusion that the activities of petitioners were arguably protected by Section 7 of the National Labor Relations Act, as amended 29 U.S.C. §157; and, as such, that the Alabama courts are preempted from determining the extent to which petitioners' conduct was unlawful under Section 13A-7-4 of the Alabama Criminal Code.

The rationale of preemption extends beyond a mere conflict[1] between federal and state substantive rules, to include a respect for the administrative expertise necessary to investigate, hear and decide the application of such rules to specific facts in light of federal labor policy. *Garner v. Teamsters,* 346 U.S. 485, 490, 74 S.Ct. 161, 98 L.Ed.2d 228 (1953).

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[1] It should be noted that there is not necessarily a clear conflict between Section 13A-7-4 and the lawful exercise of Section 7 rights by petitioners in the present case. Specifically, this Court could find that Section 13A-7-4 requires a showing that petitioners were on the premises unlawfully, that "unlawfully" does not include peaceful exercise of Section 7 rights and that the prosecution failed to introduce any evidence on this issue.

Given the foregoing, while preemption is indeed a "difficult area," general principles dispositive of this case can be identified. First, preemption of state law is the rule rather than the exception in labor relations. *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236, 241, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959) (Frankfurter, J.).

Second, while state regulation is permissible either if the matters regulated are peripheral to the concerns of the Act or if the matters regulated touch deeply-rooted local concerns, these exceptions are narrow, and are not invoked by the type of peaceful activity involved in the present case.

In *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 207, 98 S.Ct. 1745, 56 L.Ed. 2d 209 (1978), this Court applied the two principles previously described to arrive at a rule to the effect that peaceful union organizing activity is *never* subject to state-court jurisdiction *if the union has filed an unfair labor practice charge.*

Applying *Sears* to the present case, it is evident that, in the context of peaceful organizational activity, the enforcement of Section 13A-7-4 is preempted.[2] To con-

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[2] Whether petitioners were entitled to access to the delicatessen area involves a much more elaborate test than that enunciated in NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 75 S.Ct. 679, 100 L.Ed. 975 (1956), upon which the Court of Criminal Appeals mistakenly relied. *See, e.g.*, Seattle First National Bank v. NLRB, 638 F.2d 1221 (9th Cir. 1981); Giant Food Markets, Inc. v. NLRB, 633 F.2d 18 (6th Cir. 1980).

The fact that the Alabama Court of Criminal Appeals in an opinion allowed to stand by the Alabama Supreme Court applied the wrong legal analysis further supports this Court conforming the rule in Alabama with that of a significant number of states that have held that state tribunals were preempted in similar situations. See Wiggins v. Local 1557, Retail Clerks, 595 S.W.2d 802 (Tenn.

[footnote continued]

clude otherwise would constitute sanctioning the use of Alabama state law as an "instrument of coercion or retaliation."[3] The decision of the Alabama Supreme Court is thus in conflict with prior decisions of this Court and the petition for writ of certiorari should be granted.

B. SECTION 13A-7-4 OF THE ALABAMA CRIMINAL CODE IS OVERLY BROAD AND VAGUE AND VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

It is established beyond preadventure that activity protected by the first amendment may not be interfered with under the guise of promoting the police power. See *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

In the instant case, petitioners were peaceably assembled in a public area of the store in the exercise of their rights under Section 7 of the National Labor Relations Act and the United States and Alabama constitutions. Their arrests, like the prior discharges of the two female defendants, were aimed at thwarting these rights as well as the rights under Section 7 of all other employees of the store able to observe Albertson's lawlessness.

The arrests, charges, and ultimate convictions were predicated on Alabama Criminal Code, §13A-7-4, which provides:

1980); State ex rel. Retail Store Employees v. Black, 603 S.W.2d 676 (Mo. App. 1980); Florida Gulf Coast Building Trades Council v. Debartolo, 392 So. 2d 916 (Fla. App. 1980); John Price Associates v. Utah State Conference of Bricklayers, 615 P.2d 1210 (Utah 1980); Reece Shirley & Ron's Inc. v. Retail Store Employees, 101 LRRM 2844 (S.Ct. Kan. 1979).

[3] Bill Johnson's Restaurants, Inc. v. NLRB, _____ U.S. _____, 51 USLW 4636, 4638 (S.Ct., May 31, 1983).

Criminal trespass in the third degree.

(a) A person is guilty of criminal trespass in the third degree when he *knowingly* enters or *remains unlawfully* in or upon premises.

(b) Criminal trespass in the third degree is a violation. (Acts 1977, no. 607 §2607).

(Emphasis added).

Petitioners submit that Section 13A-7-4 is palpably unconstitutional as applied to the present case in that it is so overly broad and vague that persons of common intelligence must guess at its meaning and differ as to its application.

In *Connally v. Generally Construction Co.*, 269 U.S. 385, 391, 70 L.Ed. 322 (1926), this Court clearly enunciated the requirement that criminal statutes must be specific. See also, *Coates v. Cincinnati*, 402 U.S. 611, 99 S.Ct. 1696, 29 L.Ed. 2d 214 (1971).

The due process test that criminal statutes must satisfy is two-pronged. First, the statute must give fair notice of what conduct is prescribed. *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 647, 83 L.Ed. 889 (1930). Second, the statute must be sufficiently specific that it avoids arbitrary enforcement. *Papachristou v. Jacksonville*, 405 U.S. 156, 168-171, 92 S.Ct. 839, 31 L.Ed. 2d (1972). Section 13A-7-4 meets neither test.

A number of courts have struck down criminal trespass statutes that contain more specific language than this Alabama statute. In *Seattle v. Rice*, 612 P.2d 792, 793 (Wash. 1980), a city ordinance was held to be overly vague even though it provided in part, that:

> A person, who regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege

> unless he defies lawful order not to enter or remain, personally communicated to him by the owner of the premises or some other authorized person.

The court held that the phrase "lawful order" did not satisfy either of the due process standards as to clarity and, therefore, that the ordinance was void for vagueness. The *Rice* court reasoned that the ordinance was not sufficiently clear to prevent a person of common intelligence from having to guess as to who an authorized person was, what type of order was lawful and how long that order could be in effect.

Section 13A-7-4 is subject to the same criticism as those leveled at the ordinance in *Rice*. More importantly, the facts in the present case raise a much more serious vagueness issue: namely, whether the phrase "knowingly enters" or the phrase "remains unlawfully" can in any meaningful sense be determined to have been intended to apply to activity protected by Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. §157.

The ambiguity in Section 13A-7-4 is particularly pernicious when coupled with the petitioners' attempts to exercise their federally protected rights. Specifically, in such circumstances, Albertson's can consciously utilize vague state criminal statutes to chill, if not cut off, the exercise of such rights. Moreover, based on the ambiguity of the statute Albertson's was able to enlist the assistance of the City of Huntsville, unwittingly or otherwise, in effectuating its attempts at squelching organizing attempts at its store. Thus, without meaningful statutory guidance, the City of Huntsville, and ultimately the courts of the state of Alabama promote unequal enforcement of criminal statutes.[4]

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[4] See Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed. 2d 222 (1972).

[footnote continued]

C. THE CONVICTIONS IN THIS CASE VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THERE IS NO EVIDENCE TO SUPPORT THE CONCLUSION THAT PETITIONERS ACTED "KNOWINGLY" OR THAT THEY WERE ON THE PREMISE "UNLAWFULLY."

As the Alabama Court of Criminal Appeals noted in its opinion of August 2, 1983, "[i]t is manifestly apparent that all parties knew these people were present in the delicatessen section of Albertsons store in connection with efforts to organize the employees." (Appendix C, page 44a). Such a purpose is clearly lawful. There is absolutely no evidence that the petitioners' presence at the store was not protected by the National Labor Relations Act so as to render their actions "unlawful" within the meaning of Section 13A-7-4. Moreover, there is no evidence to show that petitioners knew they were acting unlawfully or that they believed other than that their actions were protected by federal law.

This Court simply cannot blink at the fact that this case arises out of prior discharges of union adherents attempting to organize the store. As one commentator has recently observed, the persistent decline in union membership and the increasing failure of organizing drives is directly attributable to the stubborn, coercive and unlawful resistance of employers to the representation process. Weiler, *Promises to Keep: Securing Worker's Right to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1796 (1983) (hereinafter "Weiler").

Specifically, employers like Albertson's violate the labor law with impunity, using a panoply of tools including discharge not only to punish union activists, but to warn the undecided.

> Even more importantly, the dismissal of key union adherents gives a chilling edge to the warning that union representation is likely to be more trouble for the employees than it is worth. *Id.*, at 1778.

In the present case, Albertson's has attempted to add Alabama criminal law to its arsenal.

In the absence of such evidence, the convictions are constitutionally defective and contrary to prior decisions of this Court. See *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979); *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed. 2d 1 (1978).

D. THE CONVICTIONS UNDER SECTION 13A-7-4 VIOLATE DUE PROCESS TO THE EXTENT THAT THE COURT OF CRIMINAL APPEALS IMPLICITLY FOUND THAT PETITIONERS HAD THE BURDEN TO SHOW THAT THEY WERE ON THE PREMISES LAWFULLY.

In its August 2, 1983 opinion, the Alabama Court of Criminal Appeals observed that petitioners introduced no evidence to establish their innocence (Appendix C, p. 47a, Opinion page 5) concluding that petitioners were subject to state law. This failure to introduce evidence also appears to have been the basis for the petitioners' convictions, the court below apparently finding that petitioners' actions could have been lawful only if they had shown "that the employees could only be reached while on the employer's premises."[5] However, the Constitution does not require that defendants prove their innocence. See *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970).

Specifically, both the Constitution and Section 13A-7-4 place the burden on the prosecution to establish that petitioners remained on the premise "unlawfully." There

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[5] *Id.* at 5. This test used by the Alabama Court does not fully describe defendants' Section 7 rights. *See, e.g.*, Montgomery Ward & Co. v. NLRB, 111 LRRM 3021 (7th Cir. 1981); Baptist Memorial Hospital, 229 NLRB No. 1, 95 LRRM 1043 (1977); Marshall Field & Co., 98 NLRB 88, 93-94, 29 LRRM 1305, *modified and enforced*, 200 F.2d 375, 31 LRRM 2073 (7th Cir. 1952). *See also*, note 2, *supra*.

is simply no evidence to establish that the company's request was lawful under the National Labor Relations Act, or that petitioners' refusals were not protected. The burden to establish such matters lies with the prosecution, not defendants.

E. THE PROSECUTION OF PETITIONERS UNDER SECTION 13A-7-4 IS SELECTIVE PROSECUTION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Alabama statute allows for selective prosecution in violation of the equal protection guarantee of the fourteenth amendment to the Constitution. See *Yick Wo v. Hopkins,* 118 U.S. 220, 6 S.Ct. 1064, 30 L.Ed. 200 (1886). There is no doubt that the petitioners were prosecuted because they were labor organizers, not because of their peaceful conduct. No official from the City of Huntsville sought to vindicate the rights of the petitioners to be on the premises, but instead, all emphasis was placed upon ridding Albertson's of labor agitators. Thus, we have the "unequal hand," denounced in *Yick Wo,* and facilitated by an ambiguous Alabama statute that allows any result the authority interpreting it wishes.

The real selectiveness of prosecution, however, was evident when the arresting officers would not allow Norwood or Powers to identify themselves or explain their purpose fully, even after the officers knew that they were union organizers.

Throughout the three occurrences the city and its officers knew full well that protected concerted union

activity was involved, and that the officers' actions were calculated to assist Albertson's in unlawfully removing, from a public place, labor union organizers. The action of the city, in concert with Albertson's (even after knowledge of the NLRB complaint) in continuing its charade of evenhanded prosecution was discriminatory when in fact the entire prosecutorial focus was directed to removing labor union organizers on behalf of a private employer.

F. PETITIONERS' CONDUCT IS PROTECTED UNDER SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT AND, THEREFORE, THE REQUISITE PROOF OF "GUILTY KNOWLEDGE" WAS LACKING.

In the case below Officers Harvey and Cruse, as well as the management of Albertson's, testified at length about the good-faith attempts of Powers and Norwood to explain to the Huntsville police why they had a federally protected right to be in the store. In fact, the Court of Criminal Appeals specifically found that it was apparent to both Albertson's management and police that petitioners were present at the store because they were organizing.

Under such circumstances, the evidence clearly fails to establish the requisite criminal intent.

A conviction for violating Section 13A-7-4 of the Alabama Criminal Code requires that the prosecution establish criminal intent, as evidenced by the comment to the effect that:

> A person who trespasses upon premises accidentally, *or who honestly believes that he is licensed or privileged to enter is not guilty of any offense, irrespective of possible liability on the civil side.*

(Emphasis added).

In summary, there is no evidence in the record to show that defendants manifested the requisite mental state to support a conviction, e.g., *Sherman v. State*, 626 S.W. 2d 520 (Ct. Crim. App. Tx. 1981); and as such, the convictions are inconsistent with the holdings of this Court in *Jackson v. Virginia, supra* and *Burks v. United States, supra* and the petition should be granted.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari to the Supreme Court of Alabama should be granted.

Respectfully submitted,

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APPENDIX A

IN THE MUNICIPAL COURT

CITY OF HUNTSVILLE

STATE OF ALABAMA

CITY OF HUNTSVILLE,	Case Nos.
	122168-H
vs.	122169-H
	122158-H
CANDICE WOODLEY, DEBORAH BAILS,	122159-H
DONALD NORWOOD AND	122147-H
MELVIN POWERS,	122154-H
	122157-H

Defendants

REPORTER'S OFFICIAL TRANSCRIPT ON APPEAL

Before:

Hon. W.H. Griffin, Judge
Huntsville, Alabama
Monday, December 28, 1982, 1:35 p.m.

Appearances:

For the City:

Roy Miller, Esq.
City of Huntsville Attorney

For the Defendants:

Barrett & Ray
9th Floor

Third National Bank Building
Nashville, Tennessee 37219

[3] PROCEEDINGS

1:35 p.m.

Mr. Barret: May it please the Court, I am George Barrett. I am a member of the Nashville Bar in Nashville, Tennessee. And I have with me my associate, Mr. Charles Ray. We brought our law clerk, Rudy Williams, who didn't have to go to school today at Vanderbilt, so he came with us.

We had a hearing this morning in Federal Court on an application on behalf of the Retail Clerks and these defendants in this case, plaintiffs in the 1983 case we have filed in the United States District Court alleging violation of federally protected rights by the City of Huntsville and Albertson's Supermarket, causing these persons to be arrested, in order to chill the exercise of their rights under the National Labor Relations Act and under the First Amendment and the Fourteenth Amendment to the Constitution of the United States in Article 1, section 4 of the Alabama State Constitution.

We also sought at that time to remove these cases to the United States District Court on [4] that same ground. The Judge summarily dismissed our petition for removal, which remands the cases back to this Court. And on the application for a temporary restraining order restraining the defendant, Albertson, and the City from going forward or prosecuting these cases in this court, the Judge took that matter under advisement.

And when we got back from lunch with Mr. Battle,

who is our local counsel, we had a call from the Judge's clerk. We called, and the clerk said that the Judge was inclined to deny the application for a temporary restraining order and wanted to know when we wanted a hearing on our application for a preliminary injunction.

Since that time, I have not had an opportunity to speak to counsel to determine whether there can be any other disposition of these cases or the status. And I think it may save the Court some time if, as counsel for the City indicated, we may spend a little time talking.

The Court: Let's take that opportunity right now, Mr. Barrett.

Mr. Miller: Judge, let me introduce [5] Richard Appel from Washington, the attorney representing Albertson's.

The Court: Gentlemen, do you want a recess here?

Mr. Miller: About 5 minutes, Judge.

(Brief recess.)

Mr. Miller: Your Honor, there is that great possibility that we could work it out by stipulation. But as in all cases, by the time we got around to agreeing on the stipulation, we could have tried it. So I think both sides have agreed to try these cases more or less chronological as to the events that occurred on that date.

The Court: Gentlemen, let me get my own records in some type of chronological order here and see what we can do.

Judging entirely by the documents, the initial arrest made was a Mr. Melvin Powers at 12:07 p.m.; is everyone in agreement on that?

Mr. Ray: Yes, Your Honor.

The Court: Are you all joining any of these cases?

Mr. Miller: Yes, sir. I'd like to move, [6] if it please the Court, to consolidate all cases and try them as one charge, more or less.

The Court: There is some interval of time involved here between 12:07 p.m. and 7:09 p.m. Gentlemen?

Mr. Ray: If it please the Court, I think the sequence of events, as we understand them, Mr. Powers was first arrested at 12:07. And four individuals were arrested sometime around 3:30 in the afternoon. And a third arrest was made at 7-something, as Your Honor has indicated.

We don't have any problems with the City attorney being able to put on all his proof in terms of all these cases. But we think perhaps they should remain on the same warrants they are on. In other words, we don't want to see them all consolidated into one particular one.

The Court: Those that we have that were not original arrests by the officers but were made on warrant and affidavit, they will be considered on their own merits. All right, gentlemen, if we can join them all, I'm ready.

Mr. Miller: Judge, are they joined as [7] such on a chronological set of events?

The Court: That would be the logical way to go about the cases.

Mr. Miller: All right. We call Sergeant Jackie Cruse to the stand, please.

Mr. Barrett: May it please the Court, prior to hearing these cases, we would like to move that these cases be dismissed, and I would like to be heard on that, Your Honor.

The Court: Go ahead.

Mr. Barrett: We filed—and I don't know whether the Court has seen the pleadings or not, but we alluded to it earlier. We filed on Thursday in the United States District Court for the Northern District of Alabama a removal petition for these seven cases. And simultaneously therewith, we filed an original action in the style in the same Court, the style Retail Clerks International Association Local 1557; Melvin Powers; Don Norwood; Deborah Bails; and Candice Woodley, plaintiffs, versus Albertson's

Food and Drug, Inc., and its agent George Malmberg; the City of Huntsville; and Officers Brocato, Carroll; Sergeant Cruse; Officer Harvey and Officer Wright, all [8] in their official capacity. At the time that the verified complaint was filed, we made application for a temporary restraining order restraining the Defendants from proceeding in this court on the basis that the record shows and the facts are, the undisputed facts, that these defendants were arrested seriatum, Powers first in Albertson's deli or delicatessen inside the supermarket. Then Mr. Powers, Mr. Norwood, Ms. Bails and Ms. Woodley were arrested in the delicatessen. And we alleged in the verified complaint that the purpose of the arrests was not to enforce the criminal statute of the State of Alabama or the ordinances of the City of Huntsville. But the purpose of the arrests was to chill or to prevent the exercise of the First Amendment Constitutional rights and the Alabama Constitutional rights as provided in Article I, section 4, which is freedom of speech, and the associational rights of this labor organization pursuant to section 7 of the National Labor Relations Act; and that the subject matter of this litigation is pre-empted by the National Labor [9] Relations Act, the valid act of congress pursuant to Article 6 of the Constitution of the United States; and that this Court is without subject matter of jurisdiction; and that therefore, the Plaintiffs in the Federal Court were entitled to restrain the Defendant from proceeding in this court.

The Court denied the petition for a temporary restraining order and has asked for dates when there can be a hearing on a preliminary injunction, as to whether or not we are entitled to one or whether or not the matter will be mooted by the trial in the matter of this Court today.

At the argument in chambers before Judge Holcomb this morning, it was the City's position that they are legit-

imate defenses which properly belong in this court; that is, that we raise the question of subject matter jurisdiction. And if the Court determines that it does not have subject matter jurisdiction, obviously it is not going forward. It was vigorously argued by the City this morning about the company in the Albertson case. Their counsel from Washington who is competent in the field of labor law, that that is a legitimate defense, and that the [10] place to raise it was not in Federal Court under the 42 U.S. 1983, but rather the place to raise it was in this court. And that's exactly what we are doing at this time. We are saying that the matter should be dismissed on the basis that you do not have subject matter jurisdiction; that the conduct complained of belongs exclusively to the forum created by Congress under Article 6, that is, the National Labor Relations Board.

And I represent to you, and we exhibited to the Federal Court and the City has notice of, under fair labor practice charges that we, the Union, have filed against the Company complaining of the conduct which is the source of these warrants; that is, the Company ordered these people off the premises, off the public part of their premises, at the delicatessen and fired them. But that's not germane to this. And such conduct constitutes an unfair labor practice, and that Congress created a forum in which it gave the expertise to adjudicate these matters; that is, the National Labor Relations Board. It doesn't belong to the Federal Court. It doesn't belong to the State Court. No disrespect to [11] Your Honor, no disrespect to the State Court.

But in our scheme of Constitutional Law, Congress has that authority, and they have exercised it. And the Supreme Court has consistently upheld that authority, that the State Courts are pre-empted from acting in these areas.

Now, we are not complaining and would have no right to complain about those matters that are "so deeply rooted in local interest that Congress ought not to pre-empt them, and normal police powers of the State, the rights to tort and that sort of thing, the numerous defamations of character in labor disputes." But where the conduct as complained of here is so inequitably in order with conduct protected by the National Labor Relations Act, section 7 are prohibited by section 8, then that this Court is without jurisdiction. And that's exactly what the Company argued this morning in the Albertson's case before Judge Haltom, that he didn't have jurisdiction, and we should raise these questions in this court. And we should have no fear, which we do not, I might say, in fact, that this Court would recognize these arguments as valid defenses.

[12] I might say that this similar adjunctive relief was tried by me in the State Supreme Court, tried in the State Court in Tennessee before the Sears case came out, which was a leading case stating that the National Labor Relations Board. And by the time I got to the Supreme Court, the United States Supreme Court, and the State Supreme Court, the United States Supreme Court decided that the Sears case was law. And the Tennessee Supreme Court agreed that State Courts are pre-empted of subject matter jurisdiction, and cases like this where the conduct complained of is conduct that is cognizable before the National Relations Board.

And we have a charge pending before that board. As a matter of fact, the board agent has come up here and even spoken to representatives of the City in regards to the allegations of this arrest and representatives of the Company, and have taken the statements of the Defendants in this case who are the complaining parties in the National Labor Relations Board.

Now, as I say, we don't claim an exemption from an application of local criminal aquaisi criminal [13] statutes. But in this instance, the facts are that the first time Mr. Powers was arrested, he was arrested on complaint of City officers and posted a $35 cash bond. The second time Mr. Powers was arrested along with Mr. Norwood, Ms. Bails, and Ms. Woodley, the bond all of a sudden had jumped to $500. That was on the complaint of City police officers. All during the course of that day, which was November 24th, I was in telephone communication with Mr. Younger, the City Attorney. And I said, "Mr. Younger, don't let Albertson's use the City as their pry-pole in a labor dispute between the clerks and the Company. We are not interested in getting in an argument with the City. And that's what they are doing to you."

The second time I asked Mr. Powers to go back, they arrested him on a complaint of the police officers. And I had further conversations with Mr. Younger, sited some cases to him, subsequently wrote him a letter, sent him what I considered a germane authority to the National Labor Relations Board and the Supreme Court of the United States.

The third time I sent Mr. Powers and Mr. Norwood back, told them to not have the ladies go [14] back, because they didn't need to be arrested. When they called the police, when the Company called the police, I think the City attorney ought to have realized what was going on, that Albertson's was merely using the Police Department of Huntsville as a pry-pole in their labor dispute with this union. And the police officers at that time refused to make an arrest unless the Company agent came up here and got a warrant.

Now, at that time when they were arrested, the bond went up to $550 for each Defendant. This is not a ques-

tion of criminal trespass. This is a question of a company using a city in the middle of a labor dispute—using the police power of the City in a labor dispute. And it's not a question of criminal trespass. It's a question that properly addresses itself to the National Labor Relations Board where we have properly complained and where the administrative process is taking place today, right now. And we respectfully submit that based on those facts, that what's in the record actually, increasing bond and that sort of thing, what happened the third time around, is nothing but an effort of the Company [15] to use this Court and these police officers on their side of a labor dispute. And I'm sure the City will want to maintain neutrality. And as I say, we are not here claiming any exemption from the ordinary criminal processes of the soverign State of Alabama or its agent, the City of Huntsville.

What we are saying to the Court is that this is not a simple case of criminal trespass. It is a serious case of a labor dispute—there's no violence—of a labor dispute where the Company is attempting to use the City and its police powers on their side to run the Union off from exercising the right that the Constitution of the United States and the Congress of the United States gave that labor organization, and we think, the Constitution of the State of Alabama gave it, like freedom of speech and their Article 1, section 4. And we respectfully submit that the Court lacks subject matter jurisdiction and should dismiss these cases on that basis. I am going to tell you, Your Honor, I want to repeat again: We don't claim any exemptions from the general application of the criminal laws. We understand the State Court authority of adjunctions in labor [16] disputes. They have people arrested if they violate the law, if there's a genuine viola-

tion of the law. And there's not an exemption that the National Labor Relations Act that Congress has carved out. That that's not the case here, Your Honor. That's not the case here at all.

And I'm sorry. I told Mr. Younger that we didn't want to get involved with the City. We've got enough with the Company without getting involved with the City. And I told him if he dismissed these cases, we wouldn't even include him in the Federal lawsuit. He didn't see his way clear for whatever reasons. I'm sure those he has are valid reasons to him.

But we think the simple way to dispose of this, Your Honor, is for you to cut through all the facade of being a "criminal trespass" and see it for what it is: an attempt of the Company to use the City and its police powers to keep these people from exercising their rights guaranteed them by the Federal Constitution and Federal Statute and we think the State Statute and the State Constitution.

The Court: Thank you, Mr. Barrett. Mr. [17] Miller, do you want to be heard?

Mr. Miller: I wish the Judge would take jurisdiction of Federal Judge.

The Court: Well, Mr. Barrett, you argued very persuasively. But I am not convinced at this time of the justice of what you are seeking. We are not inclined to let an enterprise or business make use of the City's laws to side against the Union nor are we inclined to let a union take advantage of any imagined immunity that they might have by virtue of the NLRA.

I am going to deny your motion. We will go to trial.

Mr. Miller: Sgt. Cruse.

SGT. JACKIE CRUSE

was sworn and testified as follows:

The Court: Mr. Barrett, would you like the rule invoked?

Mr. Barrett: Mr. Ray is going to try these, Your Honor.

Mr. Ray: Yes, sir, Your Honor. I am not sure that's going to work since we've got four different cases.

[18] Mr. Miller: That's one of the reasons I would like to consolidate them. In other words, if we try these one at a time, then I am going to have to exclude your people, and my people will go out. And it gets kind of touch and go as to who to send to court at one time on what. In other words, the three Defendants over there, if we are trying them together, they can stay in here. But then if we are not, then they are going to have to go out on the rule. In commensurate with that, my witnesses, whoever they may be, would have to go out. But what I suggest, and it makes no difference to me, is everybody can stay in here just like they are.

Mr. Ray: That's fine.

The Court: Take the stand.

[105] The Court: Thank you, Mr. Miller.

Gentlemen, there's been some issue raised over whether this was a matter that should be before this Court or purely a union dispute. Of course, this Court has nothing to do with union matters of one type or another. I do feel that a union dispute and a criminal transgression or violation can under certain circumstances go hand in hand. One does not necessarily preclude the other. It's one of my numerous blessings that I do not have to decide NLRA [106] issues. That leaves me with a very simple question of whether or not some violation of this particular City Ordinance took place on the date in question, and I am satisfied that it did. I am not convinced that it's deserving of any great deal of punishment.

I'm going to enter a finding of guilty on each charge against each Defendant and impose a fine of $25 and $17 cost.

Now, that particular penalty is for the cases that are presently before the Court. If some violated, provable arrest was made in the future involving the same or similar circumstances, then the Court would probably take a considerable dimmer view of it.

Mr. Ray: If it please the Court, we would like to pray an appeal.

The Court: Yes, sir. The Clerk will be glad to help you any way they can.

Mr. Ray: Thank you, Your Honor. May they remain on the same bonds, Your Honor?

The Court: Mr. Ray, give me a minute or two and let me check that out.

There are some professional bonds here [107] and some cash bonds posted.

APPENDIX B

CIRCUIT COURT NOS. CC82-0002CB
thru CC82-0008CB

APPEAL

TO

COURT OF CRIMINAL APPEALS OF ALABAMA

FROM

CIRCUIT COURT

OF

MADISON COUNTY, ALABAMA

POWERS; NORWOOD; WOODLEY; & BAILES
APPELLANTS

Honorable Joseph L. Battle
215 Randolph Ave. SE
Huntsville, Alabama 35801
Phone: 534-8478

ATTORNEY RETAINED

VS.

CITY OF HUNTSVILLE
APPELLEE

JUDGE DANIEL B. BANKS, JR.
JUDGMENT ENTRY: 07/07/82
NOTICE OF APPEAL: 07/07/82

EDITOR'S NOTE

PAGES 14a through 42a WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

CLERK'S RECORD

CE82-000206

312865	AFFIDAVIT AND WARRANT OF ARREST	

THE STATE OF ALABAMA
MADISON COUNTY

IN THE MUNICIPAL COURT OF
HUNTSVILLE, ALABAMA

AFFIDAVIT

Before me, Magistrate of the Municipal Court of Huntsville, Alabama, personally appeared this day George Malmberg who, upon first being duly sworn, states on oath that he she has probable cause for believing and does believe that Melanie Powers whose name is otherwise unknown to the affiant, did on, to wit, November 24 19 81, within twelve months before making this Affidavit and within the City of Huntsville, Alabama, or the Police Jurisdiction thereof, Melanie Powers did knowingly enter or remain unlawfully in or upon the premises of Albertsons Food Land Corp 1918 N. Parkway Huntsville, Ala., in violation of 13A-7-4 Code of Ala.

In violation of City Ordinance made and provided 79-436

Sworn to and subscribed before me this November 24 19 81

Robert W. Clemmer
Magistrate

AFFIANT [signature]
Address 1918 N. Parkway
Telephone Number 533-2416

WARRANT OF ARREST

THE STATE OF ALABAMA
MADISON COUNTY

IN THE MUNICIPAL COURT OF
HUNTSVILLE, ALABAMA

TO ANY LAWFUL OFFICER OF THE STATE OF ALABAMA:

Complaint on oath having been made before me that the offense of Criminal Trespass third degree has been committed within the City of Huntsville, Alabama, or the Police Jurisdiction thereof, and accusing Melanie Powers with committing the same you are therefore commanded forthwith to arrest said Melanie Powers and have him/her before the Municipal Court of Huntsville, Alabama to answer said charges

Witness my hand this 24 day of November 19 81

Robert W. Clemmer
Magistrate

AFFIDAVIT AND WARRANT

Summons Witness for City

WARRANT NO. 18743-C

WARRANT

MUNICIPAL COURT
HUNTSVILLE, ALABAMA

THE CITY OF HUNTSVILLE

vs.

Melanie Powers
Defendant

Residence

To Any Warden of City of Huntsville

You will receive

Melanie Powers

Charged with the offense of

Criminal Trespass

Third degree

unto your custody, and detain him

until legally discharged.

Amount of Bond $ 510.00 Dollars

Dated this 24 day of November

19 74

Robert W. Clement

Warrant Magistrate

CC82-000?CB

STATE OF ALABAMA
MADISON COUNTY

FILED IN OFFICE
1982 JAN -5 AM 2:2?

To Billy D. Hurbin Clerk of the Circuit Court

I, Wallace Dorning Clerk of the Municipal Court

hereby certify that on the 28th day of December 19 81 in the case of

City of Huntsville Plaintiff

vs. Melvin Powers Defendant

charged with the offense of Criminal Trespassing Third Degree

the following proceedings were had:

The defendant having theretofore been arrested, being present in open court, and the case having proceeded to a trial, the court rendered the following judgment:

"GUILTY Fined $ 25.00 , and sentenced

for Criminal Trespassing Third Degree

."

On the 28th day of December 19 81 , the defendant prayed for and obtained an appeal, and I herewith deliver to you all of the papers in said cause.

Wallace Dorning
Clerk of the Municipal Court

IN THE CIRCUIT COURT FOR MADISON COUNTY, ALABAMA

CASE NOS.: 122168-H, 122169-H, 122158-H, 122159-H, 122147-H, 122154-H, 122157-H

CITY OF HUNTSVILLE,

PLAINTIFF,

VS.

DEBORAH BAILS, DONALD NORWOOD, MELVIN POWERS, CANDICE WOODLEY,

DEFENDANTS.

MOTION TO DISMISS FOR FAILURE TO PROVE ALL THE ELEMENTS OF THE ORDINANCE

Come the Defendants who respectfully move the Court to dismiss their convictions in this matter as the prosecution failed to prove all the elements of the crime to wit: the City failed to prove that the Defendants manifested a culpable mental state as required by the ordinance.

Respectfully submitted,

/s/ George E. Barrett
GEORGE E. BARRETT

/s/ Charles R. Ray
CHARLES R. RAY

BARRETT & RAY, P.C.
217 SECOND AVENUE NORTH
NASHVILLE, TN 37201
615/244/2202

/s/ Joseph L. Battle/C.R.R.
JOSEPH L. BATTLE
215 RANDOLPH AVENUE, SE
HUNTSVILLE, AL 35801
205/584/8478

ATTORNEYS FOR DEFENDANTS

IN THE CIRCUIT COURT FOR MADISON COUNTY, ALABAMA

CASE NOS.: 122168-H, 122169-H, 122158-H, 122159-H, 122147-H, 122154-H, 122157-H

CITY OF HUNTSVILLE,

PLAINTIFF,

VS.

DEBORAH BAILS, DONALD NORWOOD, MELVIN POWERS, CANDICE WOODLEY,

DEFENDANTS.

MOTION TO DISMISS ON THE BASIS THAT DEFENDANTS WERE ILLEGALLY SEIZED

Defendants respectfully submit that their arrest was invalid under the Fourth Amendment, in that the facts underlying their arrest were not presented to a magistrate to establish that there was probable cause to issue the warrants. Therefore, the Municipal Court lacked subject matter jurisdiction and the warrants should have been dismissed.

Respectfully submitted,

/s/ George E. Barrett
GEORGE E. BARRETT

/s/ Charles R. Ray
CHARLES R. RAY

BARRETT & RAY, P.C.
217 SECOND AVENUE NORTH
NASHVILLE, TN 37201
615/244/2202

/s/ Joseph L. Battle/C.R.R.
JOSEPH L. BATTLE
215 RANDOLPH AVENUE, SE
HUNTSVILLE, AL 35801
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ATTORNEYS FOR DEFENDANTS

IN THE CIRCUIT COURT FOR MADISON COUNTY, ALABAMA

CASE NOS.: 122168-H, 122169-H, 122158-H, 122159-H, 122147-H, 122154-H, 122157-H

CITY OF HUNTSVILLE,

PLAINTIFF,

VS.

DEBORAH BAILS, DONALD NORWOOD, MELVIN POWERS, CANDICE WOODLEY,

DEFENDANTS.

MOTION TO DISMISS

Come the Defendants in the above-captioned matter who respectfully move this Court to dismiss the above-captioned action upon the ground that trespassory organizational solicitation is protected activity under Section 7 of the National Labor Relations Act, 29 U.S.C. §157, and this Court lacks subject matter jurisdiction under the doctrine of pre-emption.

Respectfully submitted,

/s/ George E. Barrett
GEORGE E. BARRETT

/s/ Charles R. Ray
CHARLES R. RAY

BARRETT & RAY, P.C.
217 SECOND AVENUE NORTH
NASHVILLE, TN 37201
615/244/2202

/s/ Joseph L. Battle/C.R.R.
JOSEPH L. BATTLE
215 RANDOLPH AVENUE, SE
HUNTSVILLE, AL 35801
205/584/8478

ATTORNEYS FOR DEFENDANTS

IN THE CIRCUIT COURT FOR MADISON COUNTY, ALABAMA

CASE NOS.: 122168-H, 122169-H, 122158-H, 122159-H, 122147-H, 122154-H, 122157-H

CITY OF HUNTSVILLE,

PLAINTIFF,

VS.

DEBORAH BAILS, DONALD NORWOOD, MELVIN POWERS, CANDICE WOODLEY,

DEFENDANTS.

MOTION TO DECLARE §13A-7-4 CODE OF ALABAMA UNCONSTITUTIONAL

Come the Defendants who respectfully request this Court to declare Section 13A-7-4, Code of Alabama, unconstitutional as being violative of the First Amendment to the United States Constitution; the due process clause of the Fourteenth and Fifteenth Amendments to the United States Constitution in that the ordinance is unconstitutionally vague and overbroad. Finally, the Defendants respectfully request the Court to declare the ordinance unconstitutional as it allows for selective prosecution in violation of the equal protection clause of the Fourteenth Amendment.

Respectfully submitted,

/s/ George E. Barrett
GEORGE E. BARRETT

/s/ Charles R. Ray
CHARLES R. RAY

BARRETT & RAY, P.C.
217 Second Avenue, North
Nashville, Tennessee 37201
(615) 244-2202

/s/ Joseph L. Battle/C.R.R.
JOSEPH L. BATTLE

215 Randolph Avenue, SE
Huntsville, Alabama 35801
(205) 584-8478

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

CITY OF HUNTSVILLE,

vs. CC 82-0002CB

MELVIN POWERS,

Defendant

ORDER

Date: July 7, 1982

This matter being duly scheduled for trial, the parties being present and before The Court, the Defendant files certain motions, namely: A motion to declare the criminal trespass statute of the State of Alabama unconstitutional; a motion to dismiss the action on the grounds that the activity was protected by the National Labor Relations Act; a motion to dismiss for failure of the prosecution to establish venue; a motion to dismiss on the grounds that there was not probable cause to issue the warrants; and a motion to dismiss for failure to prove all the elements of the ordinance. After consideration of same, those motions are DENIED. The parties stipulate that this matter be submitted to The Court on the transcript of the proceedings in the Municipal Court of the City of Huntsville. After consideration of the transcript, designated Exhibit A, The Court finds the Defendant guilty of criminal trespass in the third degree as charged.

It is therefore ORDERED, ADJUDGED, AND DECREED by The Court that the Defendant be and is hereby found to be guilty of criminal trespass in the third

degree. It is ORDERED that the Defendant be fined the sum of TWENTY-FIVE DOLLARS ($25.00) and court costs.

The Defendant giving oral notice of intent to appeal, The Court sets appeal bond at ONE HUNDRED DOLLARS ($100.00).

/s/ Daniel B. Banks Jr.
Daniel B. Banks, Jr.
Circuit Judge

AP II-3 Notice of Appeal to the Court of Criminal Appeals of Alabama

NOTICE OF APPEAL TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

Melvin Powers
Appellant

In the Circuit Court of Madison County
Case No. [illegible]

City of Huntsville, Alabama
~~State of Alabama~~
Appellee

Date of Judgment
July 7, 1982
~~Date of judgment or order~~

Notice is hereby given that Appellant appeals to the above-named court from the judgment of conviction

~~(~~

~~)~~

[or other order describing it]

entered in this case on the 7th of July, 19 82, adjudging the defendant to be guilty of the offense of Criminal Impersonation in the third degree

and as punishment thereof sentencing the defendant as follows [redacted] 110 Dollars Five and Costs

Appellant
[X] moves for an order fixing bail on appeal and for suspension of execution of sentence (15 § 372)
[ ] waives benefit of suspended sentence (15 § 371)

Filed July 7, 1982
Date

Joseph C. Scully
[illegible]
Address

Phone No.

Certified as a true copy
Witness D Hankins
Circuit Clerk

Joseph C. Scully
Attorney for Appellant

ORDER OF TRIAL COURT GRANTING MOTION FOR APPEAL BOND AND SUSPENSION OF SENTENCE

[X] Motion granted. The trial clerk is directed to admit the defendant to bail fixed at $ 100.00 with sufficient surety as provided by Title 15 § 372

D B Banks Jr
Circuit Judge

MC 82-0003C B

STATE OF ALABAMA
MADISON COUNTY

FILED IN OFFICE
1982 JAN -5 AM 2:20

To Billy D. Harbin Clerk of the Circuit Court

I, Wallace Dorning Clerk of the Municipal Court

hereby certify that on the 28th day of December 19 81 in the case of

City of Huntsville Plaintiff

vs. Melvin W. Powers Defendant

charged with the offense of Criminal Trespassing Third Degree

the following proceedings were had:

The defendant having theretofore been arrested, being present in open court, and the case having proceeded to a trial, the court rendered the following judgment:

"GUILTY Fined $ 25.00 , and sentenced for Criminal Trespassing Third Degree"

On the 28th day of December 19 81 , the defendant prayed for and obtained an appeal, and I herewith deliver to you all of the papers in said cause.

Wallace Dorning
Clerk of the Municipal Court

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

CITY OF HUNTSVILLE,

vs. CC 82-0003CB

MELVIN W. POWERS,

Defendant

ORDER

Date: July 7, 1982

This matter being duly scheduled for trial, the parties being present and before The Court, the Defendant files certain motions, namely. A motion to declare the criminal trespass statute of the State of Alabama unconstitutional; a motion to dismiss the action on the grounds that the activity was protected by the National Labor Relations Act; a motion to dismiss for failure of the prosecution to establish venue; a motion to dismiss on the grounds that there was not probable cause to issue the warrants; and a motion to dismiss for failure to prove all the elements of the ordinance. After consideration of same, those motions are DENIED. The parties stipulate that this matter be submitted to The Court on the transcript of the proceedings in the Municipal Court of the City of Huntsville. After consideration of the transcript, designated Exhibit A, The Court finds the Defendant guilty of criminal trespass in the third degree as charged.

It is therefore ORDERED, ADJUDGED, AND DECREED by The Court that the Defendant be and is hereby found to be guilty of criminal trespass in the third degree. It is ORDERED that the Defendant be fined the sum of FIFTY DOLLARS ($50.00) and court costs.

The Defendant giving oral notice of intent to appeal, The Court sets appeal bond at ONE HUNDRED FIFTY DOLLARS ($150.00).

/s/ Daniel B. Banks Jr.
Daniel B. Banks, Jr.
Circuit Judge

AP II-3 Notice of Appeal to the Court of Criminal Appeals of Alabama — Printed and for Sale by Roberts & Son, Birmingham

NOTICE OF APPEAL TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

Melvin Powers
Appellant

In the Circuit Court of Madison County
Case No. 83 00528

City of Huntsville, Alabama
State of Alabama
Appellee

Date of Judgment
July 7, 1983
Date Judgment Entered

Notice is hereby given that Appellant appeals to the above-named court from the judgment of conviction

( ) [or other order describing it]

entered in this case on the 7th of July, 19 83, adjudging the defendant to be guilty of the offense of Criminal Trespass in the Third Degree and as punishment thereof sentencing the defendant as follows: Pay a fine of Fifty and no/100 Dollars ($50.00) and costs.

Appellant
[X] moves for an order fixing bail on appeal and for suspension of execution of sentence (A.R.A. § 32)
[ ] waives benefit of suspended sentence (A.R.A. § 33)

Filed July 7, 1983
Date

Certified as a true copy
Billy D. Hankins
Circuit Clerk

Joseph C. Basile, III, Randolph Arcade Suite
Huntsville Alabama 35801 539-5413
Address Phone No.

Joseph C. Basile
Attorney for Appellant

ORDER OF TRIAL COURT GRANTING MOTION FOR APPEAL BOND AND SUSPENSION OF SENTENCE

[X] Motion granted. The trial clerk is directed to admit the defendant to bail fixed at $ Personal with sufficient surety as provided by Title 15 § 372

Circuit Judge

CC82-00041CK

STATE OF ALABAMA
MADISON COUNTY

FILED IN OFFICE
'82 JAN -5 AM 2:26

To Billy D. Harbin Clerk of the Circuit Court:

I, Wallace Dorning Clerk of the Municipal Court

hereby certify that on the 28th day of December 19 81 in the case of

City of Huntsville Plaintiff

vs. Melvin W. Powers Defendant

charged with the offense of Criminal Trespassing Third Degree

the following proceedings were had.

The defendant having theretofore been arrested, being present in open court, and the case having proceeded to a trial, the court rendered the following judgment:

GUILTY Fined $ 25.00 , and sentenced

for Criminal Trespassing Third Degree

On the 28th day of December 19 81 , the defendant prayed for and obtained an appeal, and I herewith deliver to you all of the papers in said cause.

Wallace Dorning
Clerk of the Municipal Court

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

CITY OF HUNTSVILLE,

vs. CC 82-0004CB

MELVIN W. POWERS,

Defendant

ORDER

Date: July 7, 1982

This matter being duly scheduled for trial, the parties being present and before The Court, the Defendant files certain motions, namely: A motion to declare the criminal trespass statute of the State of Alabama unconstitutional; a motion to dismiss the action on the grounds that the activity was protected by the National Labor Relations Act; a motion to dismiss for failure of the prosecution to establish venue; a motion to dismiss on the grounds that there was not probable cause to issue the warrants; and a motion to dismiss for failure to prove all the elements of the ordinance. After consideration of same, those motions are DENIED. The parties stipulate that this matter be submitted to The Court on the transcript of the proceedings in the Municipal Court of the City of Huntsville. After consideration of the transcript, designated Exhibit A, The Court finds the Defendant guilty of criminal trespass in the third degree as charged.

It is therefore ORDERED, ADJUDGED, AND DECREED by The Court that the Defendant be and is here-

by found to be guilty of criminal trespass in the third degree. It is ORDERED that the Defendant be fined the sum of ONE HUNDRED DOLLARS ($100.00) and court costs.

The Defendant giving oral notice of intent to appeal, The Court sets appeal bond at TWO HUNDRED DOLLARS ($200.00).

/s/ Daniel B. Banks Jr.
Daniel B. Banks, Jr.
Circuit Judge

AP 11-3 Notice of Appeal to the Court of Criminal Appeals of Alabama

NOTICE OF APPEAL TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

Melvin Powers
Appellant

v.

City of Huntsville, Alabama
Appellee

In the Circuit Court of Madison County
Case No. 3-2-82-43

Date of Judgment or Order
July 7, 1982

Notice is hereby given that Appellant appeals to the above-named court from the judgment of conviction

[or other order describing it]

entered in this case on the 7th of July, 19 82, adjudging the defendant to be guilty of the offense of Criminal Trespass in the Third Degree and as punishment thereof sentencing the defendant as follows: a fine Hundred dollars One Hundred Dollar Fine and Costs

Appellant
[X] moves for an order fixing bail on appeal and for suspension of execution of sentence (T. 15, § 322)
[ ] waives benefit of suspended sentence (T. 15, § 331)

Filed July 7, 1982
Date

I certified as a true copy
Billy D. Hardin
Circuit Clerk

Joseph L. Bullock III Randolph Square
Huntsville, Alabama 35813
Address Phone No.
Joseph L. Bullock
Attorney for Appellant

ORDER OF TRIAL COURT GRANTING MOTION FOR APPEAL BOND AND SUSPENSION OF SENTENCE

[X] Motion granted. The trial clerk is directed to admit the defendant to bail fixed at $ 200.00 with sufficient surety as provided by Title 15, § 312

July 7, 1982
Date

D. B. Banks Jr.
Circuit Judge

CC82-0005CB

STATE OF ALABAMA
MADISON COUNTY

FILED IN OFFICE
'82 JAN -5 AM 2:20

To Billy D. Harbin Clerk of the Circuit Court:

I, Wallace Corning Clerk of the Municipal Court hereby certify that on the 28th day of December 19 81 in the case of City of Huntsville Plaintiff vs. Donald Norwood Defendant charged with the offense of Criminal Trespassing Third Degree the following proceedings were had:

The defendant having theretofore been arrested, being present in open court, and the case having proceeded to a trial, the court rendered the following judgment:

"GUILTY Fined $ 25.00 , and sentenced _____ for Criminal Trespassing Third Degree ."

On the 28th day of December 19 81 , the defendant prayed for and obtained an appeal, and I herewith deliver to you all of the papers in said cause.

Wallace Corning
Clerk of the Municipal Court

IN THE CIRCUIT COURT OF MADISON
COUNTY, ALABAMA

CITY OF HUNTSVILLE,

vs. CC 82-0005CB

DONALD NORWOOD,

Defendant

ORDER

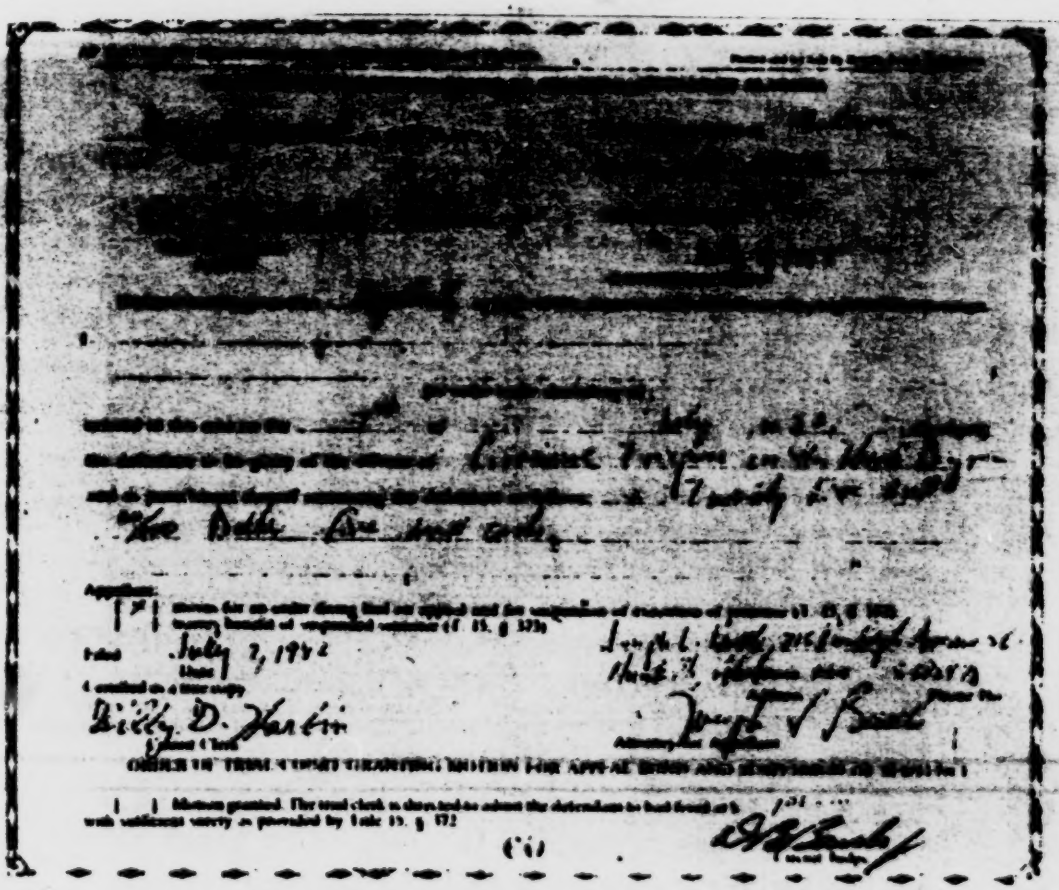
Date: July 7, 1982

This matter being duly scheduled for trial, the parties being present and before The Court, the Defendant files certain motions, namely: A motion to declare the criminal trespass statute of the State of Alabama unconstitutional; a motion to dismiss the action on the grounds that the activity was protected by the National Labor Relations Act; a motion to dismiss for failure of the prosecution to establish venue; a motion to dismiss on the grounds that there was not probable cause to issue the warrants; and a motion to dismiss for failure to prove all the elements of the ordinance. After consideration of same, those motions are DENIED. The parties stipulate that this matter be submitted to The Court on the transcript of the proceedings in the Municipal Court of the City of Huntsville. After consideration of the transcript, designated Exhibit A, The Court finds the Defendant guilty of criminal trespass in the third degree as charged.

It is therefore ORDERED, ADJUDGED, AND DECREED by The Court that the Defendant be and is hereby found to be guilty of criminal trespass in the third degree. It is ORDERED that the Defendant be fined the sum of TWENTY-FIVE DOLLARS ($25.00) and court costs.

The Defendant giving oral notice of intent to appeal, The Court sets appeal bond at ONE HUNDRED DOLLARS ($100.00).

/s/ Daniel B. Banks Jr.
Daniel B. Banks, Jr.
Circuit Judge



CC82-0006CB

STATE OF ALABAMA
MADISON COUNTY

FILED IN OFFICE
'82 JAN -5 AM 2:20

To Billy D. Harbin Clerk of the Circuit Court.

I, Wallace Dorning Clerk of the Municipal Court hereby certify that on the 28th day of December 19 81 in the case of City of Huntsville Plaintiff vs. Donand V. Norwood Defendant charged with the offense of Criminal Trespassing Third Degree the following proceedings were had:

The defendant having theretofore been arrested, being present in open court, and the case having proceeded to a trial, the court rendered the following judgment:

"GUILTY Fined $ 25.00 , and sentenced for Criminal Trespassing Third Degree ."

On the 28th day of December 19 81 , the defendant prayed for and obtained an appeal, and I herewith deliver to you all of the papers in said cause.

Wallace Dorning
Clerk of the Municipal Court

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

CITY OF HUNTSVILLE,

vs. CC 82-0006CB

DONALD NORWOOD,

Defendant

ORDER

Date: July 7, 1982

This matter being duly scheduled for trial, the parties being present and before The Court, the Defendant files certain motions, namely: A motion to declare the criminal trespass statute of the State of Alabama unconstitutional; a motion to dismiss the action on the grounds that the activity was protected by the National Labor Relations Act; a motion to dismiss for failure of the prosecution to establish venue; a motion to dismiss on the grounds that there was not probable cause to issue the warrants; and a motion to dismiss for failure to prove all the elements of the ordinance. After consideration of same, those motions are DENIED. The parties stipulate that this matter be submitted to The Court on the transcript of the proceedings in the Municipal Court of the City of Huntsville. After consideration of the transcript, designated Exhibit A, The Court finds the Defendant guilty of criminal trespass in the third degree as charged.

It is therefore ORDERED, ADJUDGED, AND DECREED by The Court that the Defendant be and is hereby found to be guilty of criminal trespass in the third degree. It is ORDERED that the Defendant be fined the sum of FIFTY DOLLARS ($50.00) and court costs.

The Defendant giving oral notice of intent to appeal, The Court sets appeal bond at ONE HUNDRED FIFTY DOLLARS ($150.00).

/s/ Daniel B. Banks Jr.
Daniel B. Banks, Jr.
Circuit Judge

AP 10-3 Notice of Appeal to the Court of Criminal Appeals of Alabama

NOTICE OF APPEAL TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

Dee Norwood
Appellant

In the Circuit Court of Madison County
Case No. CC 82 0060 CB

v.

City of Huntsville, Alabama
State of Alabama
Appellee

Date of Judgment
July 7, 1982
Date Judgment Entered

Notice is hereby given that Appellant appeals to the above-named court from the judgment of conviction

[or other order disposing of]

entered in the case on the 7th of July, 19 82 adjudging the defendant to be guilty of the offense of Criminal Trespass in the third Degree and as punishment thereof sentencing the defendant as follows: a fine of Fifty and no/100 Dollars and costs

Appellant

[X] moves for an order fixing bail on appeal and for suspension of execution of sentence (T 15, § 372)
[ ] waives benefit of suspended sentence (T 15, § 373)

Joseph L Scott 215 Fountain Ct SE Huntsville, Alabama 35801 534-8483
Address Phone No

Filed July 7, 1982
Date

Certified as a true copy
Bill D Hankins
Circuit Clerk

Joseph L Scott
Attorney for Appellant

ORDER OF TRIAL COURT GRANTING MOTION FOR APPEAL BOND AND SUSPENSION OF SENTENCE

[X] Motion granted. The trial clerk is directed to admit the defendant to bail fixed at $ 150.00 with sufficient surety as provided by Title 15, § 372

7-7-82
Date

Circuit Judge

IN THE CIRCUIT COURT OF MADISON
COUNTY, ALABAMA

CITY OF HUNTSVILLE,

vs. CC 82-0007CB

CANDACE WOODLEY,

Defendant

ORDER

Date: July 7, 1982

This matter being duly scheduled for trial, the parties being present and before The Court, the Defendant files certain motions, namely: A motion to declare the criminal trespass statute of the State of Alabama unconstitutional; a motion to dismiss the action on the grounds that the activity was protected by the National Labor Relations Act; a motion to dismiss for failure of the prosecution to establish venue; a motion to dismiss on the grounds that there was not probable cause to issue the warrants; and a motion to dismiss for failure to prove all the elements of the ordinance. After consideration of same, those motions are DENIED. The parties stipulate that this matter be submitted to The Court on the transcript of the proceedings in the Municipal Court of the City of Huntsville. After consideration of the transcript, designated Exhibit A, The Court finds the Defendant guilty of criminal trespass in the third degree as charged.

It is therefore ORDERED, ADJUDGED, AND DECREED by The Court that the Defendant be and is hereby found to be guilty of criminal trespass in the third degree. It is ORDERED that the Defendant be fined the sum of TWENTY-FIVE DOLLARS ($25.00) and court costs.

The Defendant giving oral notice of intent to appeal, The Court sets appeal bond at ONE HUNDRED DOLLARS ($100.00).

/s/ Daniel B. Banks Jr.
Daniel B. Banks, Jr.
Circuit Judge

CC82-00070S

STATE OF ALABAMA
MADISON COUNTY

FILED IN OFFICE
1982 JAN -5 AM 2:20

To Billy D. Harbin Clerk of the Circuit Court:

I, Wallace Dorning Clerk of the Municipal Court hereby certify that on the 28th day of December 1981 in the case of City of Huntsville Plaintiff vs. Candence R. Woodley Defendant charged with the offense of Criminal Trespassing Third Degree the following proceedings were had:

The defendant having theretofore been arrested, being present in open court, and the case having proceeded to a trial, the court rendered the following judgment:

"GUILTY Fined $ 25.00 , and sentenced for Criminal Trespassing Third Degree ."

On the 28th day of December 1981, the defendant prayed for and obtained an appeal, and I herewith deliver to you all of the papers in said cause.

Wallace Dorning
Clerk of the Municipal Court

AP 16-3 Notice of Appeal to the Court of Criminal Appeals of Alabama

NOTICE OF APPEAL TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

Cordaro Woodley
Appellant

In the Circuit Court of Madison County
Case No. 82-CC-79CP

v.

City of Huntsville, Alabama
Municipality of Alabama
Appellee

Date of Judgment or Date Judgment Entered
July 7, 1982

Notice is hereby given that Appellant appeals to the above-named court from the judgment of conviction

[illegible]

for other order disposing of

entered in this case on the 7th day of July, 19 82 adjudging the defendant to be guilty of the offense of Criminal Trespass in the Third Degree and as punishment thereof sentencing the defendant as follows: Thirty Five and 00/100 Dollars fine and Court.

Appellant
[X] moves for an order fixing bail on appeal and for suspension of execution of sentence (T. 15, § 372)
[ ] waives benefit of suspended sentence (T. 15, § 371)

Filed July 7, 1982
Date

Joseph L. Scott, IV, Randolph Ave. SE
Huntsville, Alabama 1984 - 536-4478
Address Phone No.

Certified as a true copy
Date

Billy D. Harbin
Circuit Clerk

Joseph L. Scott
Attorney for Appellant

ORDER OF TRIAL COURT GRANTING MOTION FOR APPEAL BOND AND SUSPENSION OF SENTENCE

[X] Motion granted. The trial clerk is directed to admit the defendant to bail fixed at $ [illegible] with sufficient surety as provided by Title 15, § 372

[illegible]

D. E. Bradley Jr.
Circuit Judge

CC82-0008CB

STATE OF ALABAMA
MADISON COUNTY

FILED IN OFFICE
1982 JAN -5 AM 2:20

To Billy D. Harbin *Clerk of the Circuit Court:*

I, Wallace Dorning *Clerk of the Municipal Court*
hereby certify that on the 28th day of December 19 81 *in the case of*
City of Huntsville *Plaintiff*
vs. Debra B. Bailes *Defendant*
charged with the offense of Criminal Trespassing Third Degree
the following proceedings were had:

The defendant having theretofore been arrested, being present in open court, and the case having proceeded to a trial, the court rendered the following judgment:

"GUILTY Fined $ 25.00 , and sentenced
for Criminal Trespassing Third Degree
."

On the 28th *day of* December *19* 81 *, the defendant prayed for and obtained an appeal, and I herewith deliver to you all of the papers in said cause.*

Wallace Dorning
Clerk of the Municipal Court

IN THE CIRCUIT COURT OF MADISON
COUNTY, ALABAMA

CITY OF HUNTSVILLE,

VS. CC 82-0008CB

DEBRA B. BAILES,

Defendant

ORDER

Date: July 7, 1982

This matter being duly scheduled for trial, the parties being present and before The Court, the Defendant files certain motions, namely: A motion to declare the criminal trespass statute of the State of Alabama unconstitutional; a motion to dismiss the action on the grounds that the activity was protected by the National Labor Relations Act; a motion to dismiss for failure of the prosecution to establish venue; a motion to dismiss on the grounds that there was not probable cause to issue the warrants; and a motion to dismiss for failure to prove all the elements of the ordinance. After consideration of same, those motions are DENIED. The parties stipulate that this matter be submitted to The Court on the transcript of the proceedings in the Municipal Court of the City of Huntsville. After consideration of the transcript, designated Exhibit A, The Court finds the Defendant guilty of criminal trespass in the third degree as charged.

It is therefore ORDERED, ADJUDGED, AND DECREED by The Court that the Defendant be and is hereby found to be guilty of criminal trespass in the third degree. It is ORDERED that the Defendant be fined the sum of TWENTY-FIVE DOLLARS ($25.00) and court costs.

The Defendant giving oral notice of intent to appeal, The Court sets appeal bond at ONE HUNDRED DOLLARS ($100.00).

/s/ Daniel B. Banks Jr.
Daniel B. Banks, Jr.
Circuit Judge

AP 16-3 Notice of Appeal to the Court of Criminal Appeals of Alabama — Printed and for Sale by Roberts & Son, Birmingham

NOTICE OF APPEAL TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

Debra Bubb
Appellant

In the Circuit Court of Madison County
Case No. 81-CC

City of Huntsville, Alabama
State of Alabama
Appellee

Date of Judgment
or Date Judgment Order
July 7, 1982

Notice is hereby given that Appellant appeals to the above-named court from the judgment of conviction

[or other order describing it]

entered in this case on the 7th day of July, 1982, adjudging the defendant to be guilty of the offense of Criminal Trespass in the Third Degree and as punishment thereof sentencing the defendant as follows: a fine of Twenty Dollars and Court Costs

Appellant
[X] moves for an order fixing bail on appeal and for suspension of execution of sentence (T. 15, § 372)
[ ] waives benefit of suspended sentence (T. 15, § 373)

Filed July 7, 1982
Date

Certified as a true copy

Betty U. Martin
Circuit Clerk

Joseph L. Scott, 215 Randolph Ave.
Huntsville, Alabama 35801 539-5593 V.A.
Address Phone No.

Joseph L. Scott
Attorney for Appellant

ORDER OF TRIAL COURT GRANTING MOTION FOR APPEAL BOND AND SUSPENSION OF SENTENCE

[X] Motion granted. The trial clerk is directed to admit the defendant to bail fixed at $ [illegible] with sufficient surety as provided by Title 15, § 372

D. B. Bankston
Circuit Judge

APPENDIX C

[Filed Aug. 2, 1983]

THE STATE OF ALABAMA–
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83

8 Div. 734

Melvin Powers, Don Norwood,
Candace Woodley, Debra Bailes

v.

City of Huntsville

Appeal from Madison Circuit Court

SAM TAYLOR, JUDGE

Defendants, Melvin Powers, Don Norwood, Candace Woodley and Debra Bailes, were charged with criminal trespass in the third degree pursuant to §13A-74, Code of Alabama 1975, for their involvement in three separate incidents which occurred in the Albertsons store in Huntsville, Alabama on November 24, 1981. Powers was charged with three separate violations, Norwood was charged with two separate violations and Woodley and

Bailes were each charged with one violation. These seven separate actions were consolidated for trial which resulted in convictions in all seven cases. Powers was fined $25, $50 and $100, respectively, for his three criminal trespass convictions resulting from his three successive instances of trespass. Norwood was fined $25 and $50, respectively, for his two criminal trespass convictions. Woodley and Bailes were each fined $25 for their single convictions for criminal trespass.

The facts of the case are essentially undisputed. The trespasses arose out of union organizational efforts being conducted by the four defendants. Powers and Norwood were employees of the retail clerks union. Ms. Woodley and Ms. Bailes had been discharged the day before by Albertsons and on this occasion both were wearing jackets reading on the back, Retail Clerks' Union Local 1557. It is manifestly apparent that all parties knew these people were present in the delicatessen section of the Albertsons store in connection with efforts to organize the employees. The store director requested all four of them to leave the premises and they refused. He called the police and the police requested them to leave. Mr. Powers attempted to present the officer with a card identifying himself with the union. There was also a National Labor Relations Board form on the table where the appellants were seated. Upon appellants' refusal to leave, the police officer placed Powers under arrest and escorted all of them from the premises. Later that afternoon, they returned; a similar incident occurred with similar results except that this time all four of them were arrested. Later that evening, Mr. Powers and Mr. Norwood returned to the store and this time were arrested pursuant to a signed warrant.

Powers, Norwood, Woodley and Bailes were tried and convicted in Huntsville Municipal Court. At the trial de

novo in the Madison County Circuit Court, a transcript of proceedings in the municipal court was received in evidence by agreement. The only testimony offered in circuit court was to establish venue. The defendants presented no evidence.

The central issue raised on this appeal is whether or not the federal government by the passage of the National Labor Relations Act preempted the law in this field, as contended by appellants, so that the state court was without jurisdiction to consider the trespass charges. In determining this issue, we are bound by and must follow the rules of law laid down by the United States Supreme Court and other federal courts in defining this thorny area of jurisdiction between the National Labor Relations Act on the one hand and the state laws on the other.

The Supreme Court in a series of cases has settled the question presented in this case adversely to appellant. The court had to determine and balance the right of employees to organize and of unions to solicit employees to organize on the one hand, and private property rights on the other. Both these rights are absolutely guaranteed by law. A review of the cases is appropriate. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed. 2d 209 (1978) the United States Supreme Court spelled out the law regarding the federal preemption insofar as picketing is concerning. The majority of the court ruled:

> "Because the assertion of state jurisdiction in a case of this kind does not create a significant risk of prohibition of protected conduct, we are unwilling to presume that Congress intended the arguably protected character of the Union's conduct to deprive the California Courts of jurisdiction to entertain Sears's trespass action."

This case is categorized as an organizational solicitation case. The United States Supreme Court held in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 75 S.Ct. 679, 100 L.Ed. 975 (1956) that there were circumstances in which non-employee union organizers have a limited right to access to an employer's premises for the purposes of engaging in organization solicitation. In *Babcock*, the employer refused to permit non-employee union organizers to distribute union literature in the company-owned parking lots. The court made a distinction between employees and non-employees engaged in organizational activities. As to employees, the court recognized the principle that no restriction may be placed on the employees's right to discuss self-organization among themselves unless the employer can demonstrate the necessity to maintain production.

As to non-employees, however, a stricter standard was established. The court refused generally to permit organizational solicitation on company property. They provided one exception only: "If the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property." (p. 113).

In *Central Hardware Co. v. National Labor Relations Board*, 407 U.S. 539, 92 S.Ct. 2238, 33 L.Ed. 2d 122 (1972), a hardware retailer caused an organizer to be arrested. The court reaffirmed the ruling in *Babcock*, quoting:

> "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accomodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the

other. The employer may not affirmatively interfere with organization; the union may not always insist the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempt by non-employees to communicate with them by usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize. 351 U.S., at page 112, 76 S.Ct. at 684."

In the more recent *Sears* case, the Supreme Court observed:

"Experience with trespassory organizational solicitation by non-employees is instructive in this regard. While *Babcock* indicates that an employer may not always bar non-employee union organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employers access rules discriminate against union solicitation. That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the board and the courts under the *Babcock* accomodation principle has rarely been in favor of the trespassory organizational activity."

In this case, there is no evidence that the employees could only be reached while on the employer's premises. Consequently the state law is not preempted by the National Labor Relations Act in this instance.

II

The appellants contend that their convictions should be reversed because §13A-7-4, Code of Alabama 1975

(criminal trespass in the third degree), is unconstitutional in that it is either vague and overbroad or allows selective prosecution in violation of the "equal protection" clause of the 14th amendment (U.S. Const. amend. XIV).

Section 13A-7-4 states that "[a] person is guilty of criminal trespass in the third degree when he knowingly *enters or remains unlawfully* in or upon premises." (emphasis added). The appellants argue that this language "is so overly broad and vague that persons of common intelligence must guess at its meaning and differ to its application." In support of their arguments the appellants refer to *City of Seattle v. Rice*, 93 Wash. 2d 728, 612 P.2d 792 (1980). The holding in *Rice* has been quaified in *City of Seattle v. Davis*, 32 Wash. App. 379, 647 P.2d 536 (1982), where the court validated the portion of the municipal ordinance corresponding to our §13A-7-4. Alabama's new trespass statutes are patterned after provisions of the New York Revised Penal Law. Alabama's §13A-7-4 corresponds to New York Revised Penal Law §140.05.

New York's §140.05 was upheld in *People v. Bush*, 39 N.Y. 2d 529, 384 N.Y.S. 2d 733, 349 N.E. 2d 832 (1976). New York's §140.10, which corresponds to Alabama's §13A-7-3 (criminal trespass in the second degree) was upheld in *Ahmed v. Rockefeller*, 308 F.Supp. 935 (S.D.N.Y. 1970). Although a different statute was involved in *Ahmed*, the United States District Court analyzed and validated the same "enters or remains unlawfully" language found in §13A-7-4. That court reasoned:

"The definition of 'trespass' is exact and straightforward, and without any explanation by the plaintiffs of just where the ambiguity lies, we conclude that it is not unconstitutionally vague. See, *Adder-*

ly v. Florida, 385 U.S. 39, 41-43, 87 S.Ct. 242, 17 L.Ed. 2d 149 (1966); *Edwards v. South Carolina*, 372 U.S. 229, 236-237, 83 S.Ct. 680, 9 L.Ed. 2d 697 (1963). Nor is it so broadly drawn that it invades an area of protected expression. Its application is limited by the word of art 'unlawfully' only to those who are in a place where they do not have a right to be. See, *Adderley v. Florida*, supra, 385 U.S. at 41-43, 47, 87 S.Ct. 242."

We do not find §13A-7-4 impermissibly vague or overbroad.

As regards the equal protection issue, neither the language of §13A-7-4 nor in its application give rise to a reasonable claim of selective inforcement.

Therefore, §13A-7-4 is not unconstitutional as challenged on this appeal.

III

Appellant's contention that the police lacked probable cause to arrest the appellants during the first two incidents is unfounded; the appellants remained on the premises after being requested to leave in the presence of the arresting officers.

The judgment of the trial court is hereby affirmed.

AFFIRMED.

ALL THE JUDGES CONCUR.

RECEIVED OCT 11 83

THE ALABAMA COURT OF CRIMINAL APPEALS

Montgomery, Alabama

RE: CC 82-0002CB thru 0008CB

8th Div. 734, MADISON Circuit Court

POWERS, NORWOOD, WOODLEY, AND BAILES

vs Appellant

CITY OF HUNTSVILLE

Appellee

Dear Sir: This is to advise you that on OCT 4 1983, the Court of Criminal Appeals announced decision of:

~~affirmance~~
~~appeal dismissed~~
✓ application for rehearing overruled
~~petition denied dismissed stricken~~

✓ No opinion.

in the above stated cause.

Yours truly,
MOLLIE JORDAN, CLERK

Kate Metcalf Clerk's Assistant

APPENDIX E

Received Oct 20 1983

IN THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

Madison County Circuit Court
Nos. CC82-002CB to -008CB

MELVIN POWERS, DON NORWOOD, CANDACE WOODLEY, and DEBRA BAILES,

Petitioners,

v.

CITY OF HUNTSVILLE,

Respondent.

Powers, Norwood, Woodley & Bailes
Counsel Retained

Defendants-Petitioners
Joseph L. Battle
215 Randolph Ave., SE
Huntsville, Alabama 35801
(205) 534-8478

George E. Barrett
Charles R. Ray
Michael J. Passino

217 Second Ave., North
Nashville, Tennessee 37201
(615) 244-2202

v.

City of Huntsville

Trial Judge: Daniel B. Banks, Jr.

Judgment Entry:

Trial Court:	7/07/82
Court of Criminal Appeals:	8/02/83
Petition to Rehear:	10/04/83

PETITION FOR WRIT OF CERTIORARI

Introduction

Melvin Powers, Don Norwood, Candace Woodley and Debra Bailes, defendants below, respectfully petition this Court, pursuant to rule 39 of the Alabama Rules of Appellate Procedure, to issue a writ of certiorari directed to the Alabama Court of Criminal Appeals. Specifically, petitioners request that this Court review a decision which was rendered on August 2, 1983, a copy of which is annexed hereto. Rehearing was denied on October 4, 1983.

Grounds

Petitioners respectfully submit that the Alabama Court of Criminal Appeals erred in affirming their convictions

for criminal trespass because that court found as a matter of fact that:

> [i]t is manifestly apparent that all parties knew these people [defendants] were present in the delicatessen section of the Albertsons store in connection with efforts to organize the employees [pursuant to rights guaranteed by the National Labor Relations Act].

Given the above finding, the decision affirming the convictions conflicts both with provisions of the United States Constitution and decisions of the United States Supreme Court.

Petitioners submit that a writ of certiorari should issue for the following reasons.

(1) *Rule 39(c)(1).* The decision of the Court of Criminal Appeals upholds the constitutionality of Section 13A-7-4 of the Alabama Criminal Code as applied to peaceful organizing activity protected by Section 7 of the National Labor Relations Act, 29 U.S.C. §157.

(2) Rule 39(c)(3): This case presents the following material questions of first impression:

(a) Whether Section 13-A-7-4 is overly broad and vague as applied to a peaceful organizing campaign protected by provisions of the National Labor Relations Act.

(b) Whether Section 13A-7-4 is pre-empted to the extent that criminal convictions are sought regarding a peaceful organizing campaign over which the National Labor Relations Board has assumed jurisdiction.

(c) Whether or not, consistent with due process, a person engaging in peaceful organizing can be convicted of "knowingly" remaining on property "unlawfully."

(d) Whether or not due process is offended by placing the burden on defendants to prove their innocence by establishing they were on the premise lawfully, as the Court of Criminal Appeals appears to have done.

(3) *Rule 39(c)(4).* The convictions of defendants conflict with prior decisions of the United States Supreme Court on the issues cited in items (1) and (2), above. The Supreme Court decisions relied upon are cited in the accompanying brief.

Conclusion

For the above-stated reasons, petitioners respectfully request this Court to issue a writ of certiorari to review the decision of the Court of Criminal Appeals of Alabama affirming their convictions for criminal trespass.

Respectfully submitted,

BARRETT & RAY, P.C.

/s/ George E. Barrett/M.P.
BY: George E. Barrett

/s/ Charles R. Ray/M.P.
BY: Charles R. Ray

/s/ Michael J. Passino
By: Michael J. Passino

217 Second Avenue, North
Nashville, Tennessee 37201
(615) 244-2202

/s/ Joseph L. Battle/M.P.
BY: Joseph L. Battle

215 Randolph Avenue, S.E.
Huntsville, Alabama 35801
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APPENDIX F

Mailing Address:
P.O. Box 157
Montgomery, Alabama 36101

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Received Nov. 28 1983

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 83-40

EX PARTE: MELVIN POWERS, DON NORWOOD, CANDACE WOODLEY and DEBRA BAILES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(RE: MELVIN POWERS, DON NORWOOD, CANDACE WOODLEY & DEBRA BAILES

Appellant

vs.

CITY OF HUNTSVILLE)

Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_ ___ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_XXXX Petition for Writ of Certiorari denied. No Opinion. JONES, J. – TORBERT, CJ., MADDOX, SHORES & BEATTY, JJ., CONCUR.

_____ Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted.

_____

11/23/83
nsh

/s/ Robert G. Esdale

Robert G. Esdale, Clerk
Supreme Court of Alabama

APPENDIX G

ALABAMA CRIMINAL CODE

* * *

§ 13A-7-1. Definitions.

The following definitions are applicable to this article:

(1) PREMISES. Such term includes any "building," as herein defined, and any real property.

(2) BUILDING. Any structure which may be entered and utilized by persons for business, public use, lodging or the storage of goods, and such term includes any vehicle, aircraft or watercraft used for the lodging of persons or carrying on business therein. Where a building consists of two or more units separately occupied or secured, each shall be deemed both a separate building and a part of the main building.

(3) DWELLING. A building which is used or normally used by a person for sleeping, living or lodging therein.

(4) ENTER OR REMAIN UNLAWFULLY. A person "enters or remains unlawfully" in or upon premises when he is not licensed, invited or privileged to do so. A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person. A license or privilege to enter or remain in a building which is partly open to the public is not a license or privilege to enter or remain in that part of the building which is not

open to the public. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privileges unless notice against trespass is personally communicated to him by the owner of such land or other authorized person, or unless such notice is given by posting in a conspicuous manner. (Acts 1977, No. 607, § 2601.)

* * *

§ 13A-7-2. Criminal trespass in the first degree.

(a) A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a dwelling.

(b) Criminal trespass in the first degree is a Class A misdemeanor. (Acts 1977, No. 607, § 2605.)

* * *

§ 13A-7-3. Criminal trespass in the second degree.

(a) A person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully in a building or upon real property which is fenced or enclosed in a manner designed to exclude intruders.

(b) Criminal trespass in the second degree is a Class C misdemeanor. (Acts 1977, No. 607, § 2606.)

* * *

§ 13A-7-4. Criminal trespass in the third degree.

(a) A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises.

(b) Criminal trespass in the third degree is a violation. (Acts 1977, No. 607, § 2607.)

APPENDIX H

Received Dec. 9 1983

COURT OF CRIMINAL APPEALS

State of Alabama
P.O. Box 351
Montgomery 36101

John O. Harris
Presiding Judge

Mollie Jordan
Clerk

John C. Tyson, III
John P. DeCarlo
John G. Bookout
William M. Bowen, Jr.
Judges

December 6, 1983

Honorable Michael J. Passino
Attorney at Law
217 Second Avenue, North
Nashville, Tennessee 37201

Dear Mr. Passino:

RE: 8 Div 734, Powers, et al vs.
City of Huntsville

The Court of Criminal Appeals has today granted a stay of sixty (60) days from November 23, 1983, to allow filing of a petition for writ of certiorari in the United States Supreme Court. This stay will remain in effect until action is taken on the petition, and if petition is granted, until a decision is rendered by the United States Supreme Court.

The certificate of final judgment has been recalled from the lower court pending determination by the United States Supreme Court, *but the certificate will be reissued upon the expiration of the sixty-day stay unless this Court is furnished with proof of the filing of said petition in the United States Supreme Court.*

Yours very truly,

/s/ Mollie Jordan

Clerk

cc: Clerk, Madison Circuit Court
Office of the City Attorney
File

MOTION FILED

MAY 30 1984

No. 83-1267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MELVIN POWERS, DON NORWOOD, CANDACE WOODLEY AND DEBRA BAILES,

Petitioners,

v.

THE CITY OF HUNTSVILLE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR ALBERTSONS, INC.—SOUTHCO DIVISION IN SUPPORT OF RESPONDENT

DANIEL JOSEPH, P.C.*
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BEST AVAILABLE COPY

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IN THE

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MELVIN POWERS, DON NORWOOD, CANDACE WOODLEY AND DEBRA BAILES,

Petitioners,

v.

THE CITY OF HUNTSVILLE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR ALBERTSONS, INC.—SOUTHCO DIVISION IN SUPPORT OF RESPONDENT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Albertsons, Inc.—Southco Division ("Albertsons") hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of Respondent was obtained. The consent of Petitioners was requested, but not given.

This case involves an issue of whether the jurisdiction of the Alabama state courts over the criminal prosecutions of Petitioners was preempted by the National Labor Relations Act. Petitioners were arrested for criminal trespass in the third degree after they refused to leave

Albertsons' property after being requested to do so. As set forth more fully in the section of Albertsons' brief entitled "Interest of the Amicus Curiae," this case directly affects Albertsons' interest in protecting its private property against the continuing threat of trespassory confrontations from Petitioners.

Respondent, the City of Huntsville, desires to defer argument on the federal labor law preemption issue to Albertsons. It is believed that Albertsons' brief amicus curiae will aid the Court in its consideration of the federal labor law preemption issue in this case.

Respectfully submitted,

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**Counsel Of Record*

and

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May 30, 1984

INTEREST OF THE AMICUS CURIAE

This brief, submitted on behalf of Albertsons, Inc.—Southco Division (hereinafter "Albertsons") as amicus curiae and joined by the City of Huntsville, Alabama, will address the issue of federal labor law preemption raised in the petition for certiorari. Albertsons urges that the Alabama state courts correctly held that the National Labor Relations Act did not preclude them from exercising subject matter jurisdiction over the criminal prosecutions of the Petitioners Powers, Norwood, Woodley and Bailes.

Petitioners were arrested for criminal trespass in the third degree after they refused to remove themselves, upon request, from the premises of Albertsons' Huntsville store.[1] Petitioners Bailes and Woodley were arrested once, Petitioner Norwood was arrested twice, and Petitioner Powers was arrested three times, all in the same day. All of the arrests occurred on the premises of Albertsons' Huntsville store.

This case thus directly affects Albertsons' interests in maintaining the integrity of its private property. Moreover, if the criminal convictions are set aside, or if the State is preempted from enforcing its criminal trespass laws, Albertsons believes that it would face a continuing threat of trespassory confrontations from Petitioners, who have clearly demonstrated their intent to disrupt Albertsons' business, if given the opportunity.

---

[1] Section 13A-7-4 of the Alabama Criminal Code provides as follows:

> A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises.

STATEMENT OF THE CASE

The four Petitioners entered the Albertsons store in Huntsville, Alabama on November 24, 1981. (Tr. 61)[2] Two of the Petitioners, Bailes and Woodley, had recently been discharged as employees of that store. Bailes and Woodley were discharged for violations of store policy, and for threatening other employees with physical violence and reprisals during their union organizing activities. At the time of their dismissal, Bailes and Woodley were advised that they would not be permitted to return to the store for any reason, in light of the circumstances which necessitated their discharge. (Tr. 61) As a result, when Bailes and Woodley entered the store, Albertsons' management informed the two former employees that they were not allowed to remain on the premises and requested them to leave immediately. (Tr. 61) Bailes and Woodley refused. At this point, Petitioners Powers and Norwood interceded on behalf of the two former employees, declaring the group's intention to remain on Albertsons' premises. (Tr. 62) Until this time, Albertsons had no idea of the identity of Powers and Norwood, or that they were associated with Bailes and Woodley. (Tr. 63) Petitioners Bailes and Woodley, along with Petitioners Powers and Norwood, proceeded to the "deli" area of the store and sat at a customer table. In response, Albertsons called the police. (Tr. 64)

Several City of Huntsville police officers responded to the call. In their presence, Albertsons' Store Manager George Malmberg repeated his request that the group leave the premises. After Malmberg's request was refused, the police themselves directed Petitioners to leave

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[2] References to the Official Transcript of the Huntsville Municipal Court proceeding are hereinafter referred to as (Tr.).

the premises or face criminal charges. (Tr. 21, 24) Despite these warnings, Petitioners refused to leave, and Petitioner Powers objected in a loud tone of voice. (Tr. 21, 70) Petitioner Powers was then arrested for criminal trespass and led from the store. (Tr. 24) The other Petitioners were not arrested, because at this time they agreed to leave voluntarily. (Tr. 24, 25) However, as the three individuals departed, they shouted and created a major disruption in the store. (Tr. 33, 72)

Later that afternoon, the same four individuals returned to the store. Again, Albertsons directed Petitioners to leave the premises, but they refused. The police were called, and after the police made several requests for the group to depart, all four Petitioners were arrested for criminal trespass. (Tr. 39-42) The same disruptive scene was repeated for a third time later that evening, and again resulted in the arrest of Petitioners Powers and Norwood. (Tr. 53, 57)

Albertsons' initial request to leave the premises was directed only at the discharged employees, Bailes and Woodley, who had previously been informed that they would not be allowed back in the store. Subsequent requests were directed toward all four Petitioners after the first confrontation demonstrated that all of the Petitioners—including Powers and Norwood—were intent upon disruptive activity. (Tr. 33, 39, 40, 85) In none of their several visits did Petitioners attempt to speak with other employees, disseminate union-oriented literature, or attempt to initiate any union organizational activity during the course of their trespass. (Tr. 21, 25)

On December 2, 1981, while Petitioners were awaiting trial on criminal trepass charges, the Retail Clerks Union, Local 1557 (the "Union") filed unfair labor practice charges against Albertsons with the National Labor Rel-

tions Board (the "NLRB") alleging, *inter alia*, violations stemming from the arrests of Petitioners. These charges involve a large number of issues, all but one of which are unrelated to the instant criminal proceeding. Pursuant to these charges, the NLRB's General Counsel issued an unfair labor practice complaint against Albertsons. A formal hearing on these charges was held before an administrative law judge, who ruled that Albertsons did not violate the National Labor Relations Act by causing the arrests of the Petitioners. The Union has filed exceptions to these findings, and final resolution of these allegations is pending before the NLRB.

On December 28, 1981, Petitioners were convicted of criminal trespass in the third degree in Huntsville Municipal Court, and fined $25.00 each plus costs. (Tr. 106) Petitioners then exercised their right to trial *de novo* in the Circuit Court of Madison County. The Circuit Court also entered the convictions and imposed $25.00 fines on all four Petitioners. Both the Municipal Court and the Circuit Court rejected Petitioners' defense that, under the federal labor law preemption doctrine, Alabama local and State courts did not have subject matter jurisdiction to hear or decide the dispute. Petitioners appealed their convictions to the Court of Criminal Appeals of Alabama which affirmed the convictions and rejected Petitioners' federal preemption arguments. Petitioners' subsequent petition for a writ of certiorari was denied by the Alabama Supreme Court. This petition followed.

ARGUMENT

The Present Case Falls Squarely Within Established United States Supreme Court Guidelines For Application Of The Federal Labor Law Preemption Doctrine

Petitioners argue that the federal labor law preemption doctrine automatically prohibited Alabama state courts

from exercising jurisdiction over the events which led to the arrests of Petitioners. They assert that the State was without power to enforce its criminal trespass laws, and that the matter should have been referred to the NLRB, because the arrests of Petitioners arose in the context of a labor relations dispute. However, the petition should be denied because existing decisions of this Court establish the guidelines for state courts to determine whether their jurisdiction is preempted by federal labor law, and the facts of the present case do not present any novel issue which was not resolved within those guidelines.

Under the doctrine enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), state courts are preempted from exercising civil jurisdiction over disputes where the challenged action is either "arguably protected" or "arguably prohibited" by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, as amended (the "Act"). *Garmon* held that, under certain circumstances, state courts should refer, to the special competence of the NLRB, consideration of actions challenging arguably protected or arguably prohibited conduct. However, *Garmon* noted that certain state interests are "so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction," preemption should not be inferred. 359 U.S. at 244. One of these state interests is the enforcement of state and local criminal laws governing trespass and other acts that breach the peace.

In *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), a union had engaged in picketing on the employer's privately-owned walkways and parking lot. When the employer requested the pickets to leave the premises, they refused, stating they would remain until forced to leave by legal action.

The employer then obtained a state court injunction against the picketing. On appeal, the California State Supreme Court reversed the injunction order, stating that, under the *Garmon* doctrine, the state court was preempted from retaining jurisdiction over the trespassory activity. This Court reversed, holding that the mere fact that the union's trespass was "arguably protected" under the Act was insufficient to deprive the state court of jurisdiction. The *Sears* holding rests upon the observation that the *Garmon* doctrine should not be applied mechanically, but rather that preemption should occur only after the state court has weighed the interests affected and assessed the danger of federal-state conflict. Specifically, application of the preemption doctrine depends upon the following factors: 1) the employer's ability to obtain NLRB review of the union's challenged conduct, or, at least, reasonably induce the trespassing party to seek such relief; 2) the state's interest in enforcing its laws; and 3) the likelihood that the trespassory conduct is properly classified as "protected" conduct under the Act. *Id.* at 200-04.

In *Sears*, the employer had no opportunity to obtain NLRB review of the challenged conduct, and could not induce the union to seek NLRB review. As a result, the employer was faced with three options: first, it could allow the trespass to continue; second, it could resort to self-help by forcibly removing the pickets; or third, it could assert its rights under the state trespass laws. The *Sears* opinion acknowledged that acquiescence and self-help were unacceptable and could be legitimately rejected. Thus, the employer was left with no real choice but to invoke the state trespass laws. This Court further emphasized that

> permitting state courts to evaluate the merits of an argument that certain trespassory activity is pro-

> tected does not create an unacceptable risk of interference with conduct which the Board . . . would find protected.

Id. at 205. Significantly, it was observed that the risk of state interference with federal labor policy was minimal, because criminal trespass is *rarely*, if ever, protected activity under the Act. *Id.; see also NLRB* v. *Babcock & Wilcox*, 351 U.S. 105 (1956). Thus, the state's interest in enforcing its trespass laws and the unlikelihood of interference with the federal statutory scheme tipped the balance decidedly against preemption.

The present case involves nothing more than a routine application of the criteria this Court has established to guide state courts in determining the scope of the federal preemption doctrine. Analysis of the facts of the instant case according to the *Garmon-Sears* framework clearly indicates that the Alabama state courts were not preempted from deciding the merits of Petitioners' prosecutions. Initially, the State acted properly in exercising its police power to keep the peace. Moreover, Albertsons was fully justified in asking the discharged employees and their companions to leave the premises. Albertsons has the right to regulate the use of its private property,[3] and properly did so, by revoking its invitation to Petitioners. Albertsons' decision to request Petitioners to leave was particularly understandable given the fact that Petitioners' initial and subsequent visits to the store were obviously intended to disrupt business and provoke a confrontation.

---

[3] In Central Hardware Co. v. NLRB, 407 U.S. 539 (1972), this Court rejected flatly the notion that a store-owner's invitation to the public somehow strips the property of its private character. Thus, Albertsons has the right to control access to its premises.

When Petitioners refused to depart, the State and Albertsons were presented with the same three options discussed in *Sears:* (1) acquiescence to the disruptive, trespassory conduct; (2) self-help by Albertsons in the form of a forceful eviction; or (3) assertion of the state trespass laws. Neither the State nor Albertsons had a realistic opportunity to seek NLRB review of the trespassory conduct. The trespasses were immediate, local and disruptive. There was hardly time to seek intervention of a distant federal agency that lacks police power. Moreover, Petitioners' actions did not appear to be subject to the prohibitions of the Act. Albertsons also was not in a position to induce Petitioners or the Union to place the validity of their actions before the NLRB.[4] Petitioners, on the other hand, could have sought NLRB review of their rights in this dispute by complying with Albertsons' request to leave the premises and then filing an unfair labor practice charge. Petitioners ignored this opportunity and instead provoked the arrests. Indeed, Petitioners waited over a week even to file a charge with the NLRB.

Albertsons' assertion of its rights under the trespass law was entirely justified and did not infringe upon any arguably protected conduct. In order to label their actions "arguably protected conduct," Petitioners isolate a single statement contained in the opinion of the Alabama Court of Criminal Appeals indicating that "all parties knew the people were present in the delicatessen section

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[4] In fact, the testimony adduced in the Municipal Court proceeding overwhelmingly demonstrated that Petitioners were not attempting to exercise their rights under the Act, but were merely engaged in provocative, illegal conduct. Under those circumstances, Albertsons had no reason to believe that the NLRB would be an appropriate forum for resolution of the trespass problem.

of Albertson's store in connection with efforts to organize the employees." (Pet. App. at 44a.) This statement, however, is merely an observation that, at some point during the day of the multiple arrests, it became obvious that Petitioners' repetitious, provocative conduct arose out of the organizational campaign at Albertsons' Huntsville store. But it is unchallenged that Petitioners did not engage in *any* form of solicitation, distribution, picketing, or other protected, concerted activity at any time while in the store. Nothing in the record suggests otherwise. Indeed, after a formal hearing on the merits of the unfair labor charges, the NLRB's administrative law judge specifically found that the four Petitioners were not in the store in order to engage in organizational activity. He also ruled that Petitioners were not asked to leave because of any union organizing activity or because of their union affiliation. Rather, on the occasion of the first trespass, Petitioners Bailes and Woodley were asked to leave because of the reasons which necessitated their discharge. The other Petitioners were included in the request only after they demonstrated an intent to disrupt store business. Albertsons' subsequent decision to prevent the group from returning after the first arrest was motivated by disruptions caused by Petitioners during the first confrontation, and had nothing whatsoever to do with Petitioners' union affiliation. *Albertsons, Inc.—Southco Division* v. *Retail Clerks Local Union 1557*, Case No. 10-CA-17793 (November 25, 1983) (administrative law judge's decision). Thus, the facts which formed the basis for Petitioners' prosecutions for criminal trespass were completely unrelated to any activity arguably protected by the Act. Because the *Garmon* preemption doctrine does not apply unless the challenged activity was either arguably prohibited or arguably protected, the Alabama state courts properly concluded that federal preemption of these prosecutions was entirely inappropriate.

Assuming *arguendo*, however, that Petitioners' conduct was somehow related to the exercise of statutory rights, it is highly unlikely that the conduct would be found to be protected under the Act. Indeed, the *Sears* opinion emphasized that trespassory organizational activity is ordinarily not protected by the provisions of the Act:

> *[P]ermitting state courts to evaluate the merits of an argument that certain trespassory activity is protected does not create an unacceptable risk of interference with conduct which the Board, and a court reviewing the Board's decision, would find protected.* For while there are unquestionably examples of trespassory union activity in which the question whether it is protected is fairly debatable, *experience under the Act teaches that such situations are rare and that a trespass is far more likely to be unprotected than protected.*
>
> Experience with trespassory organizational solicitation by nonemployees is instructive in this regard. While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule.

436 U.S. at 205 *(emphasis added). See also Babcock & Wilcox, supra.* Indeed, the criminal element of the violations and the aggravated nature of the trespassory activity in this case—Petitioners' insistence that they have the absolute right to remain in the *interior* of the Albertsons' store[5]—suggest an even stronger argument than in *Sears*

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[5] It is important to note that the Union still has available traditional, non-trespassory means for pursuing its organizational campaign. Albertsons does not seek to interfere with these rights; its sole concern is the vindication of its private property rights. The intrusive nature of the Union's claim herein is even greater than that asserted in *Sears*. In *Sears*, the Union sought access to an *exterior* portion of private property. In the instant case, the Union seeks entrance to the *interior* of the premises.

against the view that Petitioners' conduct was arguably protected. Furthermore, as stated previously, an administrative law judge has already ruled that Petitioners' conduct was not protected under the Act. Because it is unlikely that Petitioners' trespassory conduct would ever be held to be protected, there is little risk of state court interference with the federal labor scheme. Accordingly, Petitioners' preemption defense was properly rejected by the state courts.

The Pendency Of Unfair Labor Practice Charges Before The NLRB Against Albertsons Should Not Require Preemption Of These Criminal Prosecutions

Petitioners also cite *Sears* for the proposition that the pendency before the NLRB of an unfair labor practice charge against Albertsons required preemption of the state court prosecutions. Such a rule would allow any criminal defendant to evade prosecution simply by filing an unfair labor practice charge with the NLRB. Not only does this notion lack support in the *Sears* opinion, but also it presents a totally unworkable rule for applying the federal labor law preemption doctrine, as demonstrated by the facts of the present case.

First and foremost, the NLRB possesses the authority to enjoin a state court proceeding which interferes with the agency's enforcement of the Act. *See NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971). Thus, if the NLRB perceived the state criminal proceedings to be inconsistent with its statutory authority, the NLRB could have sought appropriate injunctive relief in a federal district court. Moreover, the Act empowers the NLRB, upon issuance of a complaint, to seek temporary relief under Section 10(j) in situations where the violations are clear and flagrant, and where immediate relief is necessary. The availability of these powers more than adequately

protects against State intrusion into federally protected areas.[6] Despite a request by the Union herein, the NLRB refused to pursue either course of action, indicating that it does not view the instant proceedings as disruptive of the federal statutory scheme. Indeed, the contrary appears. The administrative law judge has already held that Petitioners' conduct was not protected under the Act. Moreover, *Sears* and *Babcock & Wilcox* strongly indicate that the trespassory conduct involved herein—which at best is only marginally related to the exercise of statutory rights—will ultimately be found by the NLRB to be unprotected.

Furthermore, referral to the lengthy NLRB process—which in the present controversy has already spanned more than two years since the Union filed its complaint—would significantly and unfairly impact upon the State's ability to enforce its criminal laws and upon the rights of Albertsons. In the period between preemption of state remedies and a final NLRB decision, the State would be powerless to enforce its laws, and Albertsons would be unable to prevent Petitioners from continuing their disruptive assault on its business without the unattractive

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[6] A determination by the General Counsel's office to issue a complaint cannot by itself be considered a legal conclusion that Petitioners' activity was arguably protected. The General Counsel's action represents only a tentative decision by the prosecutorial arm of the NLRB. Until such time as the NLRB ultimately decides the issue, the General Counsel's preliminary conclusion does not constitute an agency determination. Several state courts have held that preemption of state trespass prosecutions would be proper only if and when the NLRB finally determined on the merits that the challenged conduct was protected activity. *See, e.g.*, Florida Gulf Coast Building Trades Council v. DeBartolo, 392 So.2d 916 (Fla. Dist. Ct. App. 1980); Wiggins & Co. v. Retail Clerks, Local 1557, 595 S.W.2d 802 (Tenn. 1980).

and dangerous use of self-help, which would risk inflaming a potentially explosive situation. Rejection of Petitioners' arguments, on the other hand, would allow the parties to reach a swift resoluton of this controversy in the state courts.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL JOSEPH, P.C.*
LAWRENCE D. LEVIEN, P.C.
RICHARD N APPEL
TIMOTHY B. FLEMING
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May 30, 1984

Office - Supreme Court, U.S.
FILED
JUN 1 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1267

IN THE

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OCTOBER TERM, 1983

MELVIN POWERS, DON NORWOOD,
CANDACE WOODLEY and DEBRA BAILES,
Petitioners,

v.

THE CITY OF HUNTSVILLE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1267

MELVIN POWERS, DON NORWOOD,
CANDACE WOODLEY and DEBRA BAILES,
Petitioners,

v.

THE CITY OF HUNTSVILLE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

STATEMENT OF THE CASE

A. Brief Statement Of Facts And Proceedings Below

The following facts were well stated by Amicus on behalf of Albertsons in its brief in response to the petition, however, the City wishes to point out the following particular facts. Petitioners entered the Albertsons Store in Huntsville, Alabama, on November 24, 1981. (Tr. 61)[1] Two of the Petitioners—Bailes and Woodley—had recently been discharged as employees of Albertsons' Huntsville Store. At the time of their dismissal, Bailes and Woodley were advised that they would not be permit-

[1] References to the Official Transcript of the Huntsville Municipal Court proceedings are hereafter referred to as (Tr.).

ted to return to the store for any reason in light of the circumstances which necessitated their discharge. (Tr. 61) As a result, when Bailes and Woodley entered the store, Albertsons management informed the two former employees that they were not allowed to remain on the premises and requested them to leave immediately. (Tr. 61) The former employees refused. At this point, Petitioners Powers and Norwood interceded on behalf of the other two Petitioners, declaring the group's intent to remain on Albertsons' premises. (Tr. 62) Until this time, Albertsons had no idea of the identity of Powers and Norwood, or that they were associated with Bailes and Woodley. (Tr. 63) Petitioners Bailes and Woodley, as well as Petitioners Powers and Norwood, proceeded to the "Deli" area of the store and sat at a customer table. In response, Albertsons called the police. (Tr. 64)

Several police officers responded to the call. They advised Store Manager, George Malmberg, to repeat, in their presence, his request that the group leave the premises. After Malmberg's request was refused, the police themselves directed Petitioners to leave the premises or face criminal charges. (Tr. 21, 24) Despite these ample warnings, Petitioners refused to leave voluntarily. After Petitioner Powers belligerently taunted the police with a sarcastic remark, he was arrested for criminal trespass and led from the store. (Tr. 24) The other Petitioners were not arrested because they agreed to leave voluntarily. (Tr. 24, 25). However, as the three individuals departed, they shouted slogans and created a major disruption in the store. (Tr. 33. 72).

Later that afternoon, the same four individuals returned to the store. Again, Albertsons directed Petitioners to leave the premises, but they refused. The police were called, and after the police made several requests

for the group to depart, all four members were arrested for criminal trespass. (Tr. 39, 42) The same disruptive scene was repeated for a third time later that evening, and again resulted in the arrest of Petitioners Powers and Norwood. (Tr. 53. 57)

Albertsons' initial request to leave the premises was directed only at the discharged employees, Bailes and Woodley, who had specifically been informed previously that they would not be allowed back in the store. Subsequent requests were directed toward all four Petitioners after the first arrest and confrontation demonstrated that all of the Petitioners—including Powers and Norwood—were intent upon disruptive activity. (Tr. 33, 39, 40, 85) It should also be emphasized that Petitioners did not attempt to speak with other employees or disseminate union-oriented literature during the course of their trespass. (Tr. 21. 25) Instead, they waited defiantly in the "deli" section of the store for the inevitable, disruptive confrontations with the police, without attempting to initiate any union organizational activity. The unrebutted testimony of all the police officers involved was that they had no knowledge that the individuals they were arresting had anything to do with a union organizational drive, or a labor relations problem, but that the arrests that were made were handled in the same manner as other "trespass after warning" cases were handled on a day-to-day basis in the City of Huntsville. (Tr. 24, 32, 43, 44)

On December 2, 1981, while Petitioners were awaiting trial on criminal trespass charges, the Retail Clerks Union, Local 1557 ("the Union") filed unfair labor practice charges against Albertsons with the National Labor Relations Board (the "NLRB") alleging, *inter alia*, violations stemming from the above arrests. These charges contain a multitude of issues, all but one of which is

unrelated to the instant criminal proceeding. Pursuant to these charges, the NLRB General Counsel issued an unfair labor practice complaint against Albertsons. Resolution of these allegations is pending before the NLRB.

On December 28, 1981, Petitioners were each convicted of third degree criminal trespass in Huntsville Municipal Court, and fined $25.00 each plus costs. (Tr. 106) Petitioners then exercised their right to an appeal in the Circuit Court of Madison County. The Circuit Court affirmed the convictions and imposed fines on Petitioners. The Alabama Court of Criminal Appeals affirmed the convictions and the Alabama Supreme Court denied a Petition for a Writ of Certiorari. In addition, the U.S. District Court for the Northern District of Alabama refused to grant the Petitioners injunctive relief against the City of Huntsville. (Civil Action No. 81-HM-5430-NE) Furthermore, Petitioners are involved in a case before the National Labor Relations Board (NLRB). It appears that the Petitioners are interjecting the subject matter of a NLRB dispute into ordinary criminal proceedings in the Alabama Courts. The evidence in this case shows no clear labor dispute. The Petitioners interject labor dispute questions in the case at bar through the bare assertions of their counsel. (Appendix 2a-12a)

Convictions were reached after the Municipal Court, the Circuit Court, the Alabama Court of Criminal Appeals, and the Alabama Supreme Court rejected arguments made by the Petitioners that, under the federal labor law "preemption" doctrine, Alabama local and State courts did not have subject matter jurisdiction to hear or decide this dispute and that the Huntsville Municipal Ordinance was unconstitutional.

B. The Federal Questions Alleged By The Petitioners Involve An Ordinance Of The City Of Huntsville

The present cases arise from the violation of a municipal ordinance of the City of Huntsville. Section 18-2 of the Code of Ordinances of the City of Huntsville provides that:

> "Any person or corporation committing an offense within the corporate limits of the City or within the police jurisdiction thereof, which is declared by a law or laws of the state now existing or hereafter enacted to be a violation, shall be guilty of an offense against the City. (Code 1962, § 19-1; Ord. No. 79-436, § 2, 12-27-79)."

The Alabama State Law which becomes an offense against the City is Section 13A-7-4 of the Alabama Criminal Code which provides:

> "(a) A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully on or upon premises.
>
> (b) Criminal trespass in the third degree is a violation."

Thus, the central issue in this case is the validity of a Municipal Ordinance which adopts a state statute as the law of the city.

THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE HUNTSVILLE ORDINANCE IS CONSTITUTIONAL

The City of Huntsville will argue sections B. C. D and E of Petitioner's Brief which involve the reasons for granting the Writ of Certiorari. Sections A and F of the Petitioners argument will be discussed in an Amicus Curiae Brief on the behalf of Albertsons. These sections involve questions of Labor Law peripheral to the main issues in this case. The City of Huntsville adopts the arguments of

Amicus on behalf of Albertsons with respect to those issues.

A. The Huntsville Municipal Ordinance Which Adopts Section 13A-7-4 Of The Alabama Criminal Code Is A Valid Exercise Of The Police Power Of The City And State.

A reading of the City's Trespass Ordinance will show that it is not vague or contrary to due process. The only evidence showing the Ordinance is unconstitutional is the bare allegations of the Petitioners unsupported by facts.

Section 13A-7-4 of the Alabama Criminal Code states that "(a) person is guilty of criminal trespass in the third degree when he *knowingly enters* or *remains unlawfully* in or upon premises (emphasis supplied.)

The trespass ordinance used by the City of Huntsville is an adoption of Section 13A-7-4 of the Alabama Criminal Code, 1975. In turn the drafters of the section used in the Alabama Criminal Code, 1975, adopted verbatim the language in the New York Revised Penal Law § 140.05 which is in turn adopted from the Model Penal Code § 221.2.

In *People* v. *Declemente*, 442, N.Y.S.2d, 931, (N.Y. Crim. Cit. 1981) it was held that § 140.05 of the *New York Penal Code* would substantiate the conviction of persons for trespassing upon the grounds of a department store after an order was given excluding an individual from the premises. In *People* v. *Brown*, 306 N.Y.S.2d 449, (N.Y. Ct. App. 1969) construed § 140.05 of the *New York Penal Code* to be valid and constitutional if the prosecution established (1) a lawful order not to remain personally communicated to the defendant; and (2) the defendant defies such lawful order and remains. Such was done in our case where both the police officers and store manager communicated to Petitioners that they were to leave

Albertsons Department Store and they wilfully remained. (Tr. 5, 23, 24, 39, 40, 75, 76). In *People* v. *Nunez*, 431 N.Y.S.2d 650 (N.Y. Crim. Ct. 1980) it was held that a private person has a right to bar an individual from private property (under § 140.05) and similarly could bar an individual from a quasi-private building, such as a department store, so long as the exclusion was not founded on race, creed, color, or national origin. Again, there is not one shred of evidence to show that Respondent's enforcement of § 13A-7-4 (New York Penal Code § 140.05) was based on race, creed, color, or national origin. Also, see *People* v. *Chachere*, 428 N.Y.S.2d 781 (N.Y. D.C. 1980) where it was held that under the charge of trespass (New York Penal Law § 140.05), that despite a defendant's belief that his act of trespassing was moral and justified, a defendant who participated in a mass demonstration at a nuclear power plant could not establish a defense of justification to the charge of trespassing This case would negate allowing any belief of Petitioners that what they were doing was justified to serve as a defense to the charge of "trespass after warning" especially where there is no testimony on record as to such belief.

The Alabama Court of Criminal Appeals presents a strong argument in favor of the Huntsville Ordinance: "New York's § 140.05 was upheld in *People* v. *Bush*, 39 N.Y. 2d 529, 384 N.Y.S. 2d 733, 349 N.E. 2d 832 (1976). New York's § 140.10, which corresponds to Alabama's § 13A-7-3 (criminal trespass in the second degree) was upheld in *Ahmed* v. *Rockefeller*, 308 F. Supp. 935 (S.D.N.Y. 1970). Although a different statute was involved in Ahmed, the United States District Court analyzed and validated the same "enters or remains unlawfully" language found in § 13A-7-4. That court reasoned:

> "The definition of 'trespass' is exact and straightforward, and without any explanation by the plaintiffs

> of just where the ambiguity lies, we conclude that it is not unconstitutionally vague. See, *Adderley* v. *Florida*, 85 U.S. 39, 41-43, 87 S.Ct. 242, 17 L. Ed 2d 149 (1966); *Edwards* v. *South Carolina*, 372 U.S. 229, 236-237, 83 S.Ct. 680, 9 L. Ed. 2d 697 (1963). Nor is it so broadly drawn that it invades an area of protected expression. Its application is limited by the word of art 'unlawfully' only to those who are in a place where they do not have a right to be. See *Adderley* v. *Florida*, supra. 385 U.S. at 41-43, 47, 87 S.Ct. 242."

In addition, *People* v. *Hedemann*, 438 N.Y.S. 2d 172 (1981) upheld the validity of the New York trespass statute, § 140.05, in spite of the contention that the trespass law was being enforced in a manner which infringed upon constitutionally protected speech and conduct. In that case, the defendant had been distributing tax protest literature in a branch of the Internal Revenue Service in an area open to the public that was used for the transaction of business.

Trespass statutes have been held constitutional against contentions that they violate the Fourteenth Amendment to the Federal Constitution. 75 Am. Jr. 2d 71, Trespass § 87; *Commonwealth* v. *Richardson*, 48 NE2d 678 (Mass. 1943), 146 ALR 648, see *Annotation* 146 ALR 655.

"Those who are otherwise in violation of a criminal trespass statute are not exempted from prosecution thereunder by the mere fact that while in the course of their trespass, they were displaying signs, distributing leaflets, or otherwise exercising First Amendment rights." 75 Am. Jur 2d 77, Trespass § 92; *People* v. *Harrison*, 178 N.W.2d 650, (Mich. 1970)

The Huntsville Ordinance is as specific and definite as necessary to overcome challenges to its constitutionality under the First and Fourteenth Amendments. A statute

is not unconstitutionally vague when it is set out in terms that an ordinary person using ordinary common sense can understand and comply with it. *Arnett* v. *Kennedy*, 416 U.S. 134, 40 L. Ed 2d 15, 94 S.Ct. 1633, reh. den. 417 U.S. 977 (1974), *Roth* v. *United States*, 354 U.S. 476, 1 L. Ed 2d 1498, 77 S.Ct. 1304, reh. den. 78 S.Ct. 8, (1957). If the meaning of the terms of a statute has long been recognized in law and life, it is sufficiently definite. *In Interest of Brooks*, 618 P2d 814 (Kan. 1980). The U.S. Constitution does not require impossible standards of clarity. *U.S.* v. *Petrillo* 332 U.S. 1, 91 L. Ed 1877, 67 S.Ct. 1538 (1947).

An ordinary man of common sensibilities would have no trouble understanding the language of the Huntsville City Ordinance. Any confusion resulting from the ordinance is a product of Petitioner's legal sophistry. *Kay* v. *U.S.*, 303 US 1, 82 L. Ed 607, 58 S.Ct. 468 (1938) Furthermore, there is a strong presumption of validity of statutes. The Honorable Supreme Court of the United States consistently seeks an interpretation which supports the constitutionality of legislation. *United States* v. *National Dairy Products*, 372 U.S. 29, 9 L. Ed 561, 83 S.Ct. 1011, (1963)

The void for vagueness doctrine does not require straining to inject doubt as to the meaning of words where no doubt would be felt by the normal reader. *United States* v. *Powell*, 423 U.S. 87, 46 L. Ed 2d 288, 96 S. Ct. 316 (1976).

If the general class of offenses to which a statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts may arise. *United States* v. *Harris*, 347 U.S. 612, 98 L. Ed 989, 74 S.Ct. 808, (1954).

Under the above mentioned constitutional standards set by the Honorable Supreme Court, the Trespass Ordinance of the City of Huntsville is constitutional.

B. There Is Ample Evidence In The Record Of This Case To Support The Conclusion That Petitioners Acted "Knowingly" Or Remained On the Premises "Unlawfully" Under The Terms Of The Huntsville Trespass Ordinance.

Incorporating the argument in the previous issue, supra, the City contends that the terms "knowingly" or "unlawfully" are easily understood by the ordinary individual in the context of the City's Trespass Ordinance. These terms are not so vague that men or ordinary intelligence would have trouble understanding the meaning. The City's arguments, supra, concerning vagueness are certainly applicable to this issue because the language of the Alabama Ordinance is not vague.

The Petitioners again make a bare assertion unsupported by the facts when they allege that there is a violation of the Fourteenth Amendment by the City of Huntsville. The record of this trial shows that two of the Petitioners, Bailes and Woodley, had recently been discharged as employees of Albertsons. At the time of their dismissal, Bailes and Woodley were advised that they would not be permitted to return to the store for any reason. (Tr. 61) When Bailes and Woodley entered the store, Albertsons' management requested the two former employees to leave immediately. (Tr. 61) They refused. The former employees along with Petitioners Powers and Norwood proceeded to the "deli" area of the store and sat down. Albertsons called the police. (Tr. 64)

Several police officers responded. The store manager repeated his request to leave. The Petitioners remained. Then the police asked the Petitioners to leave. Petitioner

Powers refused to leave and was arrested. The other three left voluntarily and were not arrested. (Tr. 21, 24).

Later in the afternoon the same four individuals returned. Again they were asked to leave, but they refused. The police asked the group to depart and when they refused, they were arrested for criminal trespass. This same disruptive scene was repeated later in the evening and resulted in more arrests. (Tr. 39-57).

With so many warnings by the police and the owners of the property it is inconceivable to think that the Petitioners did not *knowingly* remain on the premises *unlawfully*. The evidence overwhelmingly shows that Petitioners knowingly and unlawfully remained on the premises in violation of the City's Trespass Ordinance. Petitioners caused a major disturbance *inside* the Albertsons Store and the management of Albertsons was certainly entitled to use the law of trespass to eject those causing the disturbance.

The standard formulation of the test for unconstitutional vagueness is that of Justice Sutherland in *Connally* v. *General Construction*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L. Ed 332;

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it. What conduct on their part will render them liable to its penalties it is a well-recognized requirement. Consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The Huntsville City Ordinance certainly meets these requirements. From the facts of the case there is ample

evidence to support the conclusion that Petitioners acted knowingly and unlawfully.

C. The Court Of Criminal Appeals Correctly Found The Petitioners Guilty of Trespass

The record of the present case is completely void of any evidence that would support Petitioner's contention that the Alabama Court of Criminal Appeals found that Petitioners had the burden to show they were on the premises lawfully. In other words, there is no evidence in the case at bar that the Court of Criminal Appeals placed the burden of proof on the Petitioners to prove their innocence. As prosecutor, the City of Huntsville, had the burden of proving Petitioners guilt beyond a reasonable doubt.

Petitioners' assertion that the Petitioners were required to prove their innocence is another bald assertion unsupported by the facts in the case. Petitioners bend the facts of the case to support their argument. The Court of Criminal Appeals analyzed the United States Supreme Court case of *NLRB* v. *Babcock and Wilcox Co.*, 351 U.S. 105, 75 S.Ct. 679, 100 L. Ed 975 (1956). The Court of Criminal Appeals noted that a stricter standard was established as to non-employee union organizers. In addition, the U.S. Supreme Court refused generally to permit organizational solicitation on company property unless the employees could only be reached while on the employers' premises. (Appendix, 46a, 47a). The Alabama Court of Criminal Appeals correctly followed a decision of the United States Supreme Court in deciding the present case. There is no evidence that the Alabama Court of Criminal Appeals changed the burden of proof so that the Petitioners were required to prove their innocense. See *Babcock, supra; Sears Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 98

S.Ct. 1745, 56 L. Ed 2d 209, (1978); *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, 92 S.Ct. 2238, 33 L. Ed 2d 122 (1972).

D. The Trespass Cases Were Handled Like Any Other Trespass Case In The City Of Huntsville. There Is No Evidence In The Record Of This Case To Support The Charge Of Selective Prosecution.

Courts have held that the defense of selective prosecution is not available unless there is proof that (1) there was selectivity in enforcement; (2) that the selectivity was intentional; and (3) that selectivity was based upon some invidious or unjustifiable standard such as race, religion, or other arbitrary classification. *Starley* v. *City of Birmingham*, 377 So.2d 1131, (Ala. Crim. App. 1979); see also *Oyler* v. *Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L. Ed 2d 446 (1962); *Snowden* v. *Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L. Ed 497 (1944).

Since Petitioners have not introduced any evidence on any Court level as to such defensive matter, and there is, in fact, not one fiber or shred of evidence to substantiate that bald assertion, the Petitioners should not prevail on that contention at this late date.

The unrebutted testimony of all the police officers involved in this case is that the arrests were made and handled in the same manner as any other trespass case in the City of Huntsville (Tr. 24, 32, 43, 44). Thus, Petitioners have failed to prove their assertion of selective prosecution.

CONCLUSION

All of Petitioners arguments are bald assertions unsupported by the facts and the law of the case.

The City of Huntsville, as Respondent, and its Police Department has the prime responsibility to see that the

property rights and interests of its citizens are protected. In carrying out that legitimate police power, the Respondent had adopted as its ordinance the trespass provisions in § 13A-7-4 of the Alabama Criminal Code (1975).

The definition of "trespass" in the Huntsville City Ordinance is exact and straightforward. It is not unconstitutionally vague. Nor is it so broadly drawn that it invades an area of protected expression. Its application is limited by the word of art "unlawfully" only to those who are in a place where they have no right to be. A statute is not unconstitutionally vague if it is set out in terms that an ordinary person using ordinary common sense can understand and comply with. An ordinary man of common sensibilities would have no trouble in understanding the Huntsville City Ordinance.

The evidence before the Trial Court clearly shows that Petitioners knowingly and unlawfully remained in Albertsons in violation of the Huntsville Trespass Ordinance.

The Respondent, City of Huntsville, met its burden of proof in establishing the guilt of the Petitioners beyond a reasonable doubt.

There has been no evidence presented by the Petitioners that would substantiate the bald assertion that the Appellee has enforced their "trespass after warning" ordinance in a selective and discriminatory manner, and that same was done to "chill" Appellants' constitutional rights to organize a union. To the contrary the evidence clearly shows that the Petitioners refused to leave a place of business after their actions proved disruptive and they had been asked to leave both by management and the police officers. (Tr. 57, 58, 72, 89).

Since the Petitioners have seen fit to base their defense throughout only on the testimony presented by Respondent in the Huntsville Municipal Court, they should now be bound by the presumptions attendant to trials and hearings that are held without aid of jury, and therefore the verdicts of guilt rendered against the Petitioners in the Municipal Court and the Madison County Circuit Court are due to be affirmed. The validation of the verdict upon review in the Alabama Court of Criminal Appeals and the denial of certiorari by the Alabama Supreme Court should be upheld.

Respectfully submitted,

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